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RAPPORTS JUDICIAIRES REVISÉS

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JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

COMPRENANT LA

REVISION COMPLÈTE ET ANNOTÉE DE TOUTES LES CAUSES RAPPORTÉES DANS LES DIFFÉRENTES REVUES DE DROIT DE CETTE PROVINCE JUSQU'AU 1er JANVIER 1892

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DES CAUSES JUGÉES PAR LA COUR SUPRÊME ET LE CONSEIL PRIVÉ SUR APPEL DE NOS TRIBUNAUX.

PAR L'HONORABLE M. MATHIEU

Juge de la Cour Supérieure de Montréal, docteur en droit, professeur à la Faculté de Droit de l'Université Laval à Montréal

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TOME XIII

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1895

CAUSES RAPPORTÉES

DANS CE VOLUME

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ABRÉVIATIONS.

P. D. T. M.:—Précis des Décisions des Tribunaux du district de Montréal, 1854, par T. K. RAMSAY et L. S. MORIN, avocats.

D. T. B. C.:—Décisions des Tribunaux du Bas-Canada, en 17 volumes, commencées en 1851, par MM. LELIÈVRE, ANGERS, BEAUDRY et FLEET, avocats.

J.:—Lower Canada Jurist.

L. C. L. J.:—Lower-Canada Law Journal.

R. J. R. Q.:—Rapports Judiciaires Revisés de la province de Québec par le juge MATHIEU.

C. C.:—Code Civil du Bas-Canada.

C. M.:—Code Municipal du Bas-Canada.

C. P. C.:—Code de Procédure Civile du Bas-Canada.

S. R. Q.:—Statuts Refondus de la Province de Québec.

C. B. R.:—Cour du Banc du Roi ou *Cour du Banc de la Reine.*

C. S.:—Cour Supérieure du Bas-Canada.

RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC.

PARTAGE DE BIENS SUBSTITUES.

PRIVY COUNCIL, 6 décembre 1866.

Présent : Sir WILLIAM ERLE, Sir J.W. COLVILLE, Sir EDWARD V. WILLIAMS and Sir R. T. KINDERSLEY.

MICHEL PATRICE GUY, Appelant, et HÉLÈNE GUY, INTIMÉE.

Jugé : Qu'un partage entre majeurs appelés à une succession, et grevés eux-mêmes, fait du vivant du premier substitué, ne peut être mis au néant après un laps de plus de dix ans sous prétexte : 1o. du défaut de nomination d'un tuteur à la substitution ; 2o. de l'absence d'évaluation des biens partagés ; 3o. de la non ouverture de la substitution en faveur des copartageants au temps du partage ; et 4o. de lésion du tiers au quart ; les copartageants ayant eu la possession des biens, du moins en partie, pendant la vie du premier grevé.

Action en rescision de partage, intentée le 19 février, 1862. L'Intimé, Demandeur en Cour de première instance, alléguait, dans sa déclaration : Que feu Etienne Guy, père, laissa, de son mariage avec Catherine Vallée, trois enfants, les deux Défendeurs, Etienne Guy et Hélène Guy, cette dernière l'Appelante, et lui-même Michel Patrice Guy. Que, le 12 décembre, 1820, Etienne Guy, père, fit son testament, Bedoin, notaire, par lequel il légua à son épouse tous ses biens meubles et immeubles, sans exception, pour, par elle, en jouir, durant sa vie, à titre d'usufruit seulement, qu'avenant le décès de sa dite épouse, et l'extinction, par son décès, de l'usufruit à elle légué, le testateur donna et légua les mêmes biens, sans exception ni réserve, à tels enfants qui se trouveraient alors existant, pour par eux en jouir, à titre d'usufruit seulement, pendant la vie naturelle de tels enfants, la volonté du testateur étant que, si, lors du décès de sa dite épouse, il se trouvait des enfants vivants ou à naître en légitime mariage, ils représenteraient leur père ou mère à l'effet de partager le dit usufruit par souches, suivant l'ordre de succession ; que ce testament fut dûment publié après le décès du dit Etienne Guy, père, sur-

venu le 29 décembre, 1820; qu'après son décès, Catherine Vallée aurait, aux termes du dit testament, pris possession de tous les biens composant la succession, et en aurait joui jusqu'à l'heure de son décès, arrivé le 2 mars, 1853, laissant pour seuls et uniques représentants et enfants issus de son mariage avec Etienne Guy, père, Etienne Guy et Hélène Guy, les Défendeurs, et lui, le Demandeur, Intimé; que le 26 octobre, 1831, par acte reçu devant Marteau, et son confrère, notaires, il aurait été procédé au partage des biens immobiliers dépendant de la succession du dit feu Etienne Guy, entre les enfants, les parties ci-dessus nommées, sans aucune intervention ou participation de la part de Catherine Vallée, leur mère. Le préambule de cet acte de partage contient la déclaration suivante: "Que, par et en vertu du testament solennel de " Etienne Guy, le dit Etienne Guy aurait légué à Catherine " Vallée, son épouse, la jouissance et usufruit de tous ses biens " pour le dit usufruit éteint, retourner et appartenir la jouis- " sance et usufruit seulement des dits biens aux copartageants " sus-nommés; que, quant à la propriété des dits biens, " Etienne Guy l'a léguée à ses petits enfants, c'est à-dire, aux " enfants de ses enfants sus-nommés; quoique l'usufruit légué " à Catherine Vallée, ne soit pas encore éteint, les copartageants " désirant connaître chacun sa part et portion dans les dits " biens immobiliers, en conséquence, ils les auraient pour ce " fait partager entre eux à l'amiable, ainsi et de la manière " qui suit, &c." Le Demandeur intimé demande la nullité du partage pour les raisons suivantes: 1o. Parce qu'il n'aurait été nommé aucun curateur ou tuteur à la substitution créée par ce testament; 2o. Parce qu'il n'y avait jamais eu aucune évaluation des immeubles sujets au partage; 3o. Parce que ce partage fut fait pendant la jouissance et possession de Catherine Vallée de ces mêmes biens, et avant que les parties au partage n'y eussent aucun droit, leur droit à la propriété et à la jouissance des biens ne commençant, aux termes du testament, qu'à la mort de leur mère, laquelle vivait encore à l'époque du partage; 4o. Parceque, par ce partage, le Demandeur Intimé a été lésé, et que la lésion par lui subie était de plus du quart de la valeur de la portion à lui assignée. Par ce partage, il est échu à la Défenderesse, Hélène Guy, l'Appelante, cinq lots de terre et une rente constituée de £3 par année. Il est échu à Etienne Guy, trois lots de terre et trois rentes constituées s'élevant à £48. Michel Patrice Guy, le Demandeur intimé, a eu pour son lot des rentes constituées au montant de £86 par année, et deux terrains. Etienne Guy, l'un des Défendeurs, s'en rapporta à justice, en déclarant que le partage avait été fait de bonne foi, et exécuté depuis plus de trente ans, et qu'il le considérait valable, en autant que lui et ses co-usufruitiers y étaient con-

cernés, durant leur vie, laissant à ses enfants et à ceux de son frère et de sa sœur, comme propriétaires, de faire un nouveau partage si bon leur semblait, avant que d'entrer en possession. Hélène Guy, l'Appelante plaida : 1o. Par une exception péremptoire, qu'il s'était écoulé plus de dix ans, et même plus de trente ans, depuis la date du partage, sans que le Demandeur intimé se fût pourvu en rescision de cet acte, et, par conséquent, qu'il y avait prescription contre la demande. 2o. Par une seconde exception, elle allégua que ce partage était légal malgré que leur mère eût l'usufruit des biens; que d'ailleurs, il était de fait que leur mère, Catherine Vallée, avait consenti à ce partage en vertu duquel ses trois enfants prirent possession des biens ; elle nia que le Demandeur, intimé, eût été lésé par ce partage, et prétendit que, pendant les 25 ans qui ont suivi la date de cet acte, inclusivement, jusqu'à la fin de l'année 1856, les biens composant le lot de l'Intimé avaient été d'une plus grande valeur que les siens, et que ce fut elle qui fut lésée par ce partage, et non pas l'Intimé. Elle allégua que par le partage, les copartageants avaient renoncé au droit de se plaindre de toute lésion qui pourrait arriver dans la division des biens, et que cette stipulation rendait l'Intimé non recevable dans sa demande. Elle a prétendu, de plus, que l'Intimé était non fondé en loi à se plaindre du fait qu'un tuteur n'avait pas été élu à la substitution, que les appelés ou substitués seuls pourraient se plaindre sous ce rapport, en temps et lieu. Comme dernier moyen au soutien de cette exception, l'Appelante allégua que l'Intimé avait toujours considéré l'acte de partage valable, et, qu'en vertu de cet acte, il avait touché des capitaux de rentes, et avait vendu une partie des biens à lui assignés par ce partage, et, qu'en agissant de la sorte, il avait ratifié cet acte dont il ne pouvait plus se plaindre. Par ses réponses, l'Intimé prétendit que la prescription de dix ans ne pouvait s'appliquer à l'acte en question, qui avait été fait pendant la vie de leur mère grevée de substitution, n'avait jamais été exécuté, et ne pouvait compter que du jour du décès de leur mère. Le 4 mars 1863 la Cour Supérieure rendit le jugement qui suit : "La Cour, après avoir entendu le Demandeur et Hélène Guy, Défenderesse ; vu la déclaration faite par le Défendeur, Étienne Guy, que le partage dont il est question a été fait de bonne foi, qu'il a été exécuté suivant sa forme et teneur, depuis sa date jusqu'à ce jour, savoir, le 3 mai, 1862, ce qui forme un laps de temps de plus de trente ans, et qu'il le considère valable sous tous rapports, en autant que lui et ses co-usufruitiers y sont concernés, durant leur vie, laissant à leurs enfants légitimes, comme propriétaires, de faire un nouveau partage si bon leur semble, avant que d'entrer en possession, afin d'éviter toute contestation entre frères et sœurs,

il s'en rapporte sur le tout à ce qu'il plaira à la cour de décider ; considérant qu'après le décès de feu Etienne Guy, arrivé le 29 décembre, 1820, sa veuve, Catherine Vallée, s'est mise et est entrée en possession de l'usufruit établi en sa faveur par le testament du dit Etienne Guy, en date du 12 décembre, 1820 ; vu qu'il résulte de la preuve produite que Catherine Vallée, a joui du dit droit d'usufruit depuis le décès de son époux jusqu'au 2 mars, 1853, jour du décès de Catherine Vallée, et cela sans interruption ; considérant qu'au temps du prétendu partage du 26 octobre, 1831, entre le Demandeur et les Défendeurs, les copartageants n'étaient pas en possession du dit usufruit, et ne se sont mis en possession qu'à la mort de Catherine Vallée ; considérant que, ni au temps du prétendu partage, ni à l'époque de l'entrée en possession du dit usufruit par le Demandeur et les Défendeurs, aucune évaluation des biens, meubles et immeubles, grevés du dit usufruit n'a été faite, vu qu'il n'y a pas eu de curateur de nommé aux fins du partage, et pour veiller aux intérêts de ceux qui étaient appelés comme légataires en propriété des dits biens, meubles et immeubles ; considérant que le partage fut fait pendant la durée de l'usufruit de Catherine Vallée, et lorsqu'elle était, aux termes du testament du dit Etienne Guy, en possession, comme usufruitière, de tous les biens, meubles et immeubles, mentionnés dans le prétendu partage, vu qu'il n'appert pas que Catherine Vallée, usufruitière en possession, ait jamais consenti au partage du 26 octobre, 1831, ou qu'elle ait jamais ratifié ou approuvé le dit partage ; considérant que, sous les circonstances établies par la preuve et ci-dessus constatées, le partage du 26 octobre, 1831, est illégal, nul et de nul effet en loi ; que, supposant que le dit acte de partage fût légal, il a eu un effet seulement depuis le 2 mai, 1853, jour du décès de Catherine Vallée, et que, partant, la prescription invoquée par la Défenderesse ne s'applique pas, a débouté et déboute les exceptions péremptoires, par la Défenderesse plaidées en cette cause, et, procédant à juger sur le mérite de la demande du Demandeur ; considérant que le Demandeur a établi, par la preuve et en droit, que le partage du 26 octobre, 1831, était et est illégal et nul, maintient l'action du Demandeur ; la cour, en conséquence, déclare le partage du 26 octobre, 1831, reçu devant Marteau, et son confrère, notaires, rescindé, annulé, nul et de nul effet, et la cour le met au néant, réservant au Demandeur tout et tel recours qu'en droit et en justice lui appartient pour le recouvrement des profits et revenus perçus par les Défendeurs en vertu de tel partage. (1)

(1) Autorités citées par l'Appelante : Pothier, Nos 541, 564, 565, 566 ; 5 Toullier, No 801 ; 2 Ricard, Traité 3, chap. 9, sect. 3, part. 1, p. 407 et suiv. et Nos. 696, 701, 704, 708 ; Guyot, Rép. vbo. Partage, p. 612.

Hélène Guy appela de ce jugement à la Cour du Banc de la Reine, en appel.

MONDELET, Juge : L'intimé s'était pourvu devant la Cour Supérieure, siégeant à Montréal, pour faire mettre de côté, un partage fait entre lui et les Appelants, en date du 26 octobre, 1831, des biens immobiliers dépendant de la succession de feu Etienne Guy, leur père. L'intimé se fonde sur plusieurs raisons, entre autres, les suivantes ; 1° Qu'il n'aurait été nommé aucun curateur ou tuteur à la substitution créée par le testament du dit feu Etienne Guy ; 2° Qu'il n'y a jamais eu aucune évaluation des immeubles sujets au partage ; 3° Parce que ce partage fut fait pendant la jouissance et possession de Catherine Vallée, (veuve du dit Etienne Guy,) et avant que les parties au partage n'y eussent aucun droit, leur droit à la propriété et à la jouissance des biens, ne commençant, aux termes du testament, qu'à la mort de leur mère, laquelle vivait encore à l'époque du prétendu partage ; 4° Parce que, par ce partage, l'intimé a été lésé, et que la lésion par lui subie, était de plus du quart de la valeur de la portion à lui assignée. L'appelante répondit que l'action devait être renvoyée, parce que : 1° L'intimé ne s'était pas pourvu dans les dix ans après le partage, et qu'il s'était écoulé plus de trente ans depuis ; 2° Que le partage était légal et permis, bien que ce fût du temps de la veuve, leur mère, qui avait la jouissance ; que ce partage l'était d'une succession qui leur était destinée ; que ce partage était égal et juste, et qu'il avait eu son exécution du consentement de leur mère ; 3° Point de lésion ; au contraire, les biens de l'Intimée, lors du partage, avaient plus de valeur que ceux de l'Appelante, qui n'ont augmenté de valeur que dernièrement. Voici les questions qui se présentaient : 1° Le testament de feu Etienne Guy, comporte-t-il une substitution, et les appelés au second degré, pouvaient-ils procéder légalement à un partage de biens, dans lesquels ils n'avaient qu'une espérance ? Ce partage est-il nul ? 2° A-t-on pu ainsi procéder à un partage, sans tuteur à la substitution, et sans évaluation faite des biens, au préalable ? 3° Supposant le partage valable, la prescription de l'ordonnance compterait-elle de la date de ce partage, ou seulement du jour que les parties au partage ont eu la possession par la mort de leur mère ? 4° Y a-t-il eu lésion suffisante pour donner à l'Intimé droit à obtenir la rescision du partage ? 5° A-t-il tellement ratifié ou approuvé ce partage qu'il soit maintenant déchu du droit d'en demander la mise au néant ? Je pense : 1° Que ces enfants pouvaient *provisoirement* faire ce partage, même du vivant de leur mère, et durant sa jouissance. Car, à proprement parler, c'est moins un partage *réel*, qu'un état pour établir, par anticipation, ce qui leur pourrait revenir, par la suite, si le cas y échéait. Ce

n'est pas spéculer ou tabler sur la succession d'un père (testateur) vivant, ce qui serait immoral et est prohibé par la loi, c'est purement et simplement convenir de la manière dont se feraient les choses, si jamais l'occasion surgissait de donner suite à cet arrangement. 2° Ainsi, qu'il y ait ou non, substitution, la question demeure la même, et ne peut recevoir aucune atteinte défavorable aux prétentions de l'Appelante, par le fait que la veuve vivait. 3° Il en doit être de même, à raison de la difficulté que l'Intimé fait résulter de la non nomination d'un tuteur à la substitution. Il ne s'agit pas des droits substitués ou de leur ordre, le partage ne touche aucunement à ces droits, et les substitués, si le cas y échet, prendront leurs parts comme si rien n'eût été fait. 4° Je fais la même observation à la non évaluation des biens. Les substitués ne peuvent être privés d'aucun de leurs droits par ce partage, ou plutôt cet arrangement provisoire. 5° La prescription court (du moins suivant moi, car il y a partage d'avis sur cette question,) du jour du partage, et non de la prise de possession par la mort de la veuve. Je tiens que c'est un arrangement provisoire, auquel on pourrait donner ou ne pas donner suite, en sorte que tout naturellement et en raison, doit-on dire, que c'est dans les dix ans, que l'Intimé a pu se pourvoir contre ces conventions provisoires. 6° Il me paraît que c'est la valeur des terrains, *lors du partage*, qui doit être la mesure de la lésion, s'il y en a eu et non pas la valeur survenue depuis, par suite de causes imprévues lors du partage ; cela posé, non seulement l'Intimé n'a pas établi lésion, mais la preuve constate que son lot avait, lors du partage, plus de valeur que celui de l'Appelante. 7° L'Intimé est, suivant moi, déchu du droit de revenir contre cet accord, ou arrangement provisoire, disons conservatoire, qu'il a ratifié, approuvé, et auquel il a donné suite, tout aussi longtemps qu'il a cru de son intérêt de le faire. 8° Il me paraît en outre, et je ne le dis que d'abondant, que la veuve, mère des parties, a, tacitement du moins, approuvé cet arrangement. D'après ces raisons, je suis d'avis que le jugement dont est appel, est mal fondé en droit et en fait, qu'il doit être infirmé, et l'action de l'Intimé déboutée. Je dois remarquer que j'ai énoncé mes propres opinions, sans en rendre solidaires mes honorables collègues. La cour est unanime quant aux motifs du jugement, tel que je l'ai rédigé, et que je vais le lire : La Cour d'Appel, composé des juges DUVAL, MEREDITH, MONDELET et BADGLEY, a, le 1 mars 1864, rendu le jugement suivant :

" LA COUR : Considérant que le partage du 26 octobre 1831, et dont l'Intimé, par son action, réclamait l'annulation et mise au néant, pour les raisons et causes énoncées en sa déclaration, est en loi légal, et a pu être fait et conclu, comme il l'a été

valablement entre les parties à icelui, qui n'ont statué que sur les parts d'usufruit qu'elles recueillaient du chef de leur père, Etienne Guy, et qu'en icelui partage, il n'y a eu aucune lésion, les dites parties à icelui, d'ailleurs, étant majeures; considérant que, par le partage, les parties à icelui, majeures, et à toutes fins, en droit de le faire, pour établir purement et simplement ce qui pourrait éventuellement leur revenir dans leurs droits à recueillir du chef de Etienne Guy, est obligatoire pour toutes les parties au partage ; considérant que, dans le jugement dont est appel, il y a par conséquent, erreur, casse, annulle et met au néant le jugement rendu par la Cour Supérieure, siégeant à Montréal, le 4 mars 1863, et cette cour procédant à rendre le jugement que la cour de première instance eût dû rendre, déclare l'Intimé mal fondé en son action, laquelle est par le présent jugement déboutée." Le conseil privé a confirmé le jugement de la Cour du Banc de la Reine. (14 *D. T. B. C.*, p. 229 et 17 *D. T. B. C.*, p. 122.)

LAFLAMME, R. et G., pour Michel Patrice Guy.
LEBLANC et CASSIDY, pour Hélène Guy.

CAPIAS.—BAIL BOND.

COURT OF QUEEN'S BENCH, Montreal, 9th March, 1864.

IN APPEAL FROM THE SUPERIOR COURT, District of St. Francis.

Before: DUVAL, C.-J., MEREDITH, J., MONDELET J., and BADGLEY, J.

JAMES A. SEWELL, (Petitioner in Court below), Appellant, *and* AARON B. VANNEVAR *et al.*, (Plaintiffs in court below), Respondents.

Held: That a Defendant who has been arrested by virtue of a writ of *capias ad respondendum*, and who has given bail to the sheriff for his appearance at the return of the said writ, may put in special bail or security at any time, and, even after judgment rendered in the original suit, upon special application therefor, and sufficient cause shewn for extending the time of putting in such bail.

2nd. That in default of the Defendants' putting in such special bail, his sureties, who have given bail to the sheriff for his appearance, may do so at any time, upon application for that purpose, and sufficient cause shown. (1)

This appeal was from a judgment rendered in a cause instituted in the Superior court, in the district of Saint Francis, wherein Respondents were Plaintiffs, and Justin M. De Courtenay, Defendant, refusing the application of Appellant,

(1) V. art. 824 et 828, C. P. C.

one of the Defendants, bail to the sheriff, praying leave to put in special bail. It is recorded in these terms: "The prayer of petitioner to put in special bail is rejected, with costs." The action in which this petition of Appellant was denied, commenced by a writ of *capias ad respondendum* against the body of De Courtenay. He had, some time previous to the issuing of the writ, been a resident in the district of St. Francis, but had removed therefrom; and, at the period of the suing out of the process against him, was domiciled at the parish of St. Foy, in the district of Quebec The writ issued out of the Court at Sherbrooke returnable there, on the first day of October, 1861; it was addressed to the sheriff of the district of Quebec, who arrested Defendant at his residence in the parish of St. Foy. At the request of Defendant, Appellant consented to become bail to the sheriff, and, thereupon, entered into the usual bond. On the 9th of the month of October, De Courtenay applied to the court at Sherbrooke for permission to put in special bail, and prayed leave to do so at Quebec, setting forth, in his petition for that purpose, that, under the writ of *capias*, he had been arrested in the district of Quebec, and had there given bail to the sheriff of that district, that the condition of the bond by him and his bail entered into, was, that, on or before the return day of the writ, or within eight days thereafter, he should give security as by law provided, or put in special bail to the action; that, in discharge of his bail to the sheriff, he was desirous of either giving the said security, or of putting in special bail, but that he was unable to furnish such security or special bail in the district or St. Francis, but was prepared to give it before the court in the district of Quebec, where he was then residing; and he prayed that he might be permitted to put in such security or special bail before one of the judges of the court, or the prothonotary, at Quebec, on such day as the court at Sherbrooke might be pleased to appoint. The truth of the facts set forth in this petition was established by Defendant's affidavit. The presentation of the petition to the court at Sherbrooke, in the district of St. Francis, took place within the eight days next after the return day of the writ of *capias ad respondendum*. The judgment of the court, there, upon the application to give security or a bail bond at Quebec, is in these words: "Parties are heard on petition, petition is rejected, with costs." The Respondents prosecuted their action against DeCourtnay, and, on the 17th June, 1862, obtained judgment for the sum of $1307.62, with interest from the 4th September, 1861, and costs. The Appellant, subsequently learning his position, and the liability he had incurred towards Respondents, presented to the court, sitting at Sherbrooke, a memorial asking permission to put in special bail in discharge of his previous

bond to the sheriff. This he did on the 13th March, 1863, and in it he represented that he had always purposed such bail should be given, and had in the month of October, 1861, within the time appointed by law, caused Defendant to petition the judge at Sherbrooke for leave so to do, and from that period had been under the impression that special bail had in fact been received, and, therefore, he had given the matter no further thought. These averments were supported by his own affidavit, as well as by that of Defendant; notwithstanding this, however, his prayer was refused by the court below, the judgment thereon being, as before stated, that his petition was rejected with costs. It was from this judgment (which is reported in 12 *R. J. R. Q.*, p. 88,) that an appeal was instituted.

Andrews, for Appellant, said: The Appellant submits that he is aggrieved, by these decisions of the Court below, which fasten upon him a liability towards Respondent, to so large an amount as a sum exceeding $1300. He believes the policy of the law, at this period, whatever it may have been in former years, is entirely adverse to such an interpretation of the statute, and at variance with its spirit; he sees that the proceedings against a debtor, formerly so rigorous in England, from which country the process of *capias ad Respondendum* was introduced into Canada, as to permit the arrest of the person in almost every case, were, at the earliest period of Canadian legislation, after the cession of the colony to the British Crown, so far modified, that the arrest before judgment was not permitted, except upon an affidavit that Defendant was on the point of leaving the Province, whereby Plaintiff might be deprived of his remedy against him. (17 Geo. 3, chap. 2, and 25 Geo. 3, chap. 2.) Indeed, the legislation upon the subject has been, in England as well as in this country, for a series of years past, constantly and steadily leading to the protection of the person of the debtor from imprisonment, while, at the same time, it aims to make his property available to his creditors: we have seen additional facilities from time to time afforded for the taking of the absconding debtor, but such arrest is not sanctioned unless there be a fraudulent intention in leaving the Province; and, whereas, formerly, the imprisonment of the body in execution for debt was permitted in all cases where the *capias ad Respondendum* had issued, as well as in satisfaction of all judgments given in commercial matters, now, in Canada at least, the execution against the body, or *capias ad satisfaciendum* is abolished. We now find that, by means of the security bond which the law allows Defendant to give, he cannot be constrained even to remain in the Province, if he has committed no fraud as regards his estate, but has fairly given it

up for the benefit of his creditors. Thus, the entire aim of the law at the present day is, that property shall be liable for debts, but that the person shall be free, so long as the debtor is not guilty of fraud in respect of his estate; consequently, the arrest of the body is permitted under the writ of *capias ad Respondendum* entirely with this view; and the bond required to be given to the sheriff is also to the same end, that the estate of the debtor shall be delivered honestly to the creditor; and nothing else is demanded of the debtor or his bail. The early *ordonnances* of Canada (17 Geo. 3, ch. 2, and 25 Geo. 3, ch. 2,) regulating the process of attachment against the body, directed that the sheriff should hold the Defendant to bail, or commit him to prison until special bail should be given, or until two days after execution might be obtained by Plaintiff. The condition of the special bail then was, that the party arrested would surrender himself in execution, his body being, as before remarked, then liable to imprisonment in execution in all cases where the writ of *capias ad Respondendum* had issued, as well as in satisfaction of judgments in commercial matters, but at a later period it was enacted (5 Geo. 4, ch. 2), that the recognizance of special bail should be, that Defendant should not leave the Province without paying the debt: at first the debtor had to pay, or remain in goal in execution; afterwards, instead of being confined in prison, he was only held to give bail to remain in the Province: and now he is permitted to enter into a security bond which permits him to go where he will, so long as he conducts himself honestly. The same statute which provided that the recognizance of special bail should be that the Defendant should not leave the Province without paying his debts, and which corrected the evil of imprisonment in default of payment, expressly provided that such bail might be put in at any time, either before or after judgment, thus distinctly shewing that, at that period, the law intended merely that the creditor should have a right to the presence of his debtor in the Province, and nothing more, and that the bail should at no time be held to secure him any thing but this. The 12 Vic., ch. 42, in its preamble, declares that imprisonment for debt, where fraud is not imputable to the debtor, is not only demoralizing in its tendency, but is detrimental to the true interest of the creditor. And it is this act which first permitted the giving of the security bond, whereby the debtor is at liberty to range the world, if he faithfully put his creditors in possession of his estate. This latter statute is re-enacted in the consolidated statutes of Lower Canada, ch. 87, sec. 3 and contains the following clause, exception and proviso, which have given rise (as appears, as before stated on the

report of the case now under consideration), to the refusal of the prayer of the Appellant's petition in the court below. The act in its 12th section declares that nothing therein shall prevent any person arrested under any writ of *capias ad Respondendum* from putting in special bail to the action, as permitted by the law of Lower Canada then in force. *Excepting* only that such special bail shall not be received unless put in on the return day, or at any time before the return day, or within the eight days next after the return day, *provided always* that it shall be in the power of the court, upon special application, and sufficient cause shown, to extend the time for putting in such special bail. Now the Court below appears to have considered itself precluded by the *exception* in this statute, and, therefore, rejected Appellant's application, because the period of eight days next after the return day of the action had elapsed, before the permission to give special bail was sought; the Court conceiving itself tied and bound by its literal construction of the enactment of the exception, and that no relief could be granted under the provision of the act immediately following it. The Appellant trusts this honorable Court will view the matter in a different light, and afford him that relief which was denied him by the learned judge in the Court below. He confidently expects this, not only from the equity of his prayer, but because he conceives a construction of the statute according to its spirit is favourable to his pretensions; and because the question now submitted has several times come before the Courts in the district of Quebec and Montreal, and so far as Appellant is informed, has always been so decided, as to give relief to parties similarly circumstanced. The judges before whom the point has been argued, have held that the delay of eight days is not so fatal to the bail as the Court below seems to have supposed it. In the case of Miles and Aspinall, decided by M. Justice MONK, presiding in the Superior Court, at Montreal, since the ruling of the judge in the court below, special bail was permitted to be given after the expiration of the period mentioned in the statute. (1) A similar application was

(1) La sect. 3 du chap. 87 des S. R. B. C. était en ces termes : La condition de toute reconnaissance pour un cautionnement spécial ou cautionnement de l'action qui doit être donné ou fourni par aucun Défendeur qui aura été arrêté, en vertu d'un bref de *capias ad respondendum*, émis en conformité des dispositions de la loi, sera telle que les cautions ne pourront devenir responsables, à moins que le Défendeur ne laisse le Bas-Canada, sans avoir acquitté la dette, ainsi que l'intérêt et les frais de l'action qui aura été intentée ; et tel cautionnement spécial ne sera pas reçu à moins qu'il ne soit donné le jour du rapport du dit bref ou en aucun temps avant ce jour, ou dans les huit jours qui suivront celui du rapport ; mais la cour pourra, sur demande spéciale et cause montrée, prolonger le délai pour fournir tel cautionnement spécial. " La Cour peut, sous les dispositions de la section 3 du ch. 87 des S. R. B. C.,

made some few years since to the late M. Justice CHABOT, sitting in a cause of *Begin et al.* vs. *Bell et al.*; (1) and that learned judge, although he refused the application, did so solely for the reason that no special grounds were set forth in support of it, and not because it was too late to grant it; that judge stating the terms of the statute required such a request should be special, and only granted upon sufficient cause shewn. In another cause, *Lefebvre* vs. *Faillie*, (2) M. Justice BADGLEY held that special bail may be put in even two years subsequent to the judgment, and after the bail to the sherif had been sued upon their bond, and this he permitted to be done on petition of the bail themselves, that honorable judge stating it to be true, that the reason assigned in the case before him by the bail, namely, that they were ignorant of the law, was certainly a weak one, but that as the application could do no harm to the Plaintiff, who had still his security as provided by law, he could grant the application. The question was also brought before the Superior Court, at Quebec, presided over by M. Justice MEREDITH, when special bail was received by him seven months after judgment, and after action on the bond to the sherif had been instituted. The correctness of this proceeding came to be argued before this honorable Court, sitting in appeal, when the judgment permitting the special bail to be given was not disturbed. *Campbell* vs. *Atkins et al.* (12 *R. J. R. Q.*, p. 91.) It is true that in this last mentioned case, which was a peculiar one, and presented questions that the present one does not, the Court composed of four judges was equally divided, and thus the decision of M. Justice MEREDITH remained affirmed. The Honorable Sir

reproduisant les dispositions de la section 12 du ch. 42 du Statut du Canada de 1849, 12 Vict., permettre de fournir un cautionnement spécial après les huit jours du rapport du bref de *capias*, et même après que le shérif a transporté le cautionnement qui lui a été fourni. (*Miles* vs. *Aspinal*, C. S., Montréal, 1er Décembre 1862, MORIN, J., 12 *R. J. R. Q.*, p. 94.)

(1) La demande de fournir un cautionnement spécial, faite après les huit jours du rapport du bref, doit contenir des raisons suffisantes pour la justifier ; et, si le requérant ne montre pas cause, sa demande sera renvoyée pour cette raison. Statut du Canada de 1849, 12 Vict., chap. 42, sect. 12. (*Bégin et al.* vs. *Bell et al.*, C. S., Québec, 1er mars 1858, CHABOT, J., 6 *R.J.R.Q.*, p. 172.)

(2) Sous les dispositions de la sect. 12 du chap. 42 du S. du C. de 1849, 12 Vict., la cour peut permettre au Défendeur, qui a été arrêté sur capias, et à ceux qui ont fourni pour lui le cautionnement au shérif, de fournir un nouveau cautionnement que le Défendeur se remettra et livrera entre les mains du shérif, quand il en sera requis, et qu'à défaut par lui de ce faire, les cautions requérantes seront tenues de payer la dette et ce, après que le jugement a été rendu maintenant le capias et que le shérif a transporté le cautionnement qui lui a été fourni, et qu'une poursuite a été intentée contre les cautions originaires, basée sur ce cautionnement. (*Lefebvre* vs. *Vallée*, et *Vallée et al.*, Requérants, C. S., Montréal, 30 Décembre 1858, BADGLEY, J., 7 *R. J. R. Q.*, p. 96.)

Louis Hypolite Lafontaine, Chief-Justice, expressed an opinion that the application to extend the delay ought properly to be made before the expiration of the period which it was desired to extend, or at least that it should be so before the rendering of the final judgment in the suit: now if it could be, under any circumstances, allowed after the expiration of the eight days, then the Court is not irremediably bound by the strict letter of the statute; and, if the bail could not be received after the final judgment in the cause, it must be for other reasons, not to be found in the statute. The Hon. M. Justice Caron, who pronounced the judgment in this honorable Court in the last mentioned case, stated that one of the questions to be decided was, whether the application had been made in time or not; the Appellant, to establish that it had not been, refers the Court to the 12th Vict., ch. 42, sect. 12, requiring that the bail shall be put in within eight days after the return day of the *capias*. The Respondent in answer says this delay may be extended by the Court, on cause shewn; to this the Appellant replies: the application to extend the period should be made before such period has elapsed. In this reply, the learned judge adds, there is some plausibility, and the terms of the proviso seem to lend themselves to such an interpretation of the statute, but when the spirit of the law is considered, which is entirely in favor of the liberty of the subject, and means to restrain as much as possible imprisonment for debt, we (remarked the judge) come to the conviction that the power of the Court to extend this delay is not limited to the time during which the delay lasts. Where so much has been said by the able judges before whom this question has come, it may be thought presumptuous in counsel to offer further remarks, yet the hardship of forcing their client to pay a debt not his own, to enrich Respondents, they trust, may be their excuse when they further submit that the ruling of the Court below seems to be a sacrifice of the spirit of the law, and of justice to the mere letter of the law. They respectfully contend that if the decision of the Court below be maintained by this tribunal, debtors hereafter will be most injuriously affected if, not having given bail to the sheriff, they, further, from any ignorance of the law, want of means, or friends, anxiety of mind, or other cause, omit the giving of special bail until after the expiration of eight days after the return day of the writ, for then they must hopelessly remain in prison until they are able to satisfy their creditor. If to enable themselves properly to defend their interests, and to avoid imprisonment, they decide to give bail to the sheriff, how difficult will it hereafter be, even for the most honest man, to procure such bail, when the risk of ruin

by an error or mistake on his part in letting pass the fatal eight days, becomes generally known. If there is a discretionary power vested in the Court, there was a failure of justice in refusing to exercise it, and Appellant believes that, with every desire in the learned judge in the Court below to soundly interpret the law, he has failed to do so; the construction put upon the statute by the other judges who held a different view on the question, is certainly not opposite to the spirit of the law, but in accord with it, while the litteral construction of the statute would lead to great hardship, because if, under no cause shewn, no peculiar circumstances, special bail could be received after the period of eight days from the return day of the writ, then no error of fact or law, no mistake, or deception, no dangerous illness, no unavoidable absence, or even deception, fraud or violence, whereby special bail was omitted to be put in or prevented, would be of any avail either to the unfortunate debtor in prison, or to his bail to the sheriff, if such there were. If the Court is absolutely restrained and prohibed, as the Court below seems to have ruled, then no matter what the cause shewn the decision must be the same. But the interpretation, both before and since the judgment of the Court below, put upon the statute by the other judges to whom the question has been submitted, is one which affords relief against the abuse of the law, by allaying the rigor of its letter, while, at the same time, it does not contradict or overturn, but, on the contrary, upholds its spirit, and maintains its grounds and principles. The Appellant believes the Court below has erred in its decision, and confidently expects he will be relieved from its, to him, ruinous effects, by the reversal of the judgment of which he complains.

For Respondents it was argued that apart from the question as to the power of the court to have granted said petition, the same was properly rejected for several other reasons: 1st. The petitioners, of whom Appellant was one, were not parties to the original cause, and there is nothing in the record to show that they ever gave bail to the sheriff, except their affidavits produced with said petition, and the return of the sheriff to the *capias* shows that Defendant was in his custody, but does not state that he was in the custody of the bail. 2nd. If a petition to put in special bail were made, it could only have been made by Defendant, who did not petition, and the provisions of the 21st section Consolidated Statutes of Lower Canada, cap. 87, and of the 3rd sub-section of section 1st of same Act, only provide for a Defendant's being allowed to put in special bail, under certain circumstances. 3rd. The conditions of the bond to be taken by the sheriff, are that Defendant shall give security to the court, while

petitioners allege that the conditions of the bond given by them were, that they, petitioners, should, within the time provided, give security required by law, or should put in special bail to the action. No such bond could have been taken by the sheriff, and would have been illegal. 4th. The petitioners asked that they might be permitted to put in special bail; this, if granted, could not be carried into effect; it is Defendant who gives the bail, and no legal bond could be executed to which he would not be a party, and he did not join petitioners, nor express any desire to join them in giving security. As to the question whether special bail can be given after judgment rendered, Respondents respectfully submit that, under the provisions of our statute law, as it now is, the courts have only the discretionary power of extending the time for putting in such bail upon special application and cause shown while the suit is pending; that, after final judgment has been rendered in any cause, the court are no longer permitted to exercise that power, and have no jurisdiction in the matter of putting in bail. The terms of the Statute are positive upon that point, and the powers conferred upon the court cannot be extended. The application in the present instance was to put in special bail, and the only provision of law now in force with regard to such bail declares that such bail shall not be received unless put in within a certain number of days, but that the court may extend that period, upon application made, and sufficient cause shown. No application was made to extend the time prescribed, and Defendant has forfeited his rights under the law. In fact, in this case, Defendant never has made any application whatsoever to be relieved from his default. By Defendant's failure to put in bail, he has relieved himself from the obligation to make the statement which otherwise, under the 12th section Con. Stat. Lower Canada, cap. 87, he would have been bound to make, and Respondents have been deprived of the benefit of that statement and the effect of declaring that a party arrested, or his bail, may at any time, after judgment has been rendered, apply to and obtain permission to put in special bail from the court, would be that the provisions of the law regulating Defendant's arrest for fraud, could not be carried into effect, unless Defendant chooses to perform what his bail bound themselves he should perform, and if bail were allowed to be put in after judgment, the provisions of the 12th section of the Act could not be carried into effect. This case differs entirely from the case of *Campbell* vs. *Atkins*, inasmuch as in that case the permission of the court had been granted to Defendant upon his application, while here he has made no application; and Respondents contend that the petitioners

could not legally make the application in their own right and names.

MONDELET, J., said : The petitioner having applied to Honorable Judge SHORT to be permitted to put in special bail for one De Courtnay, who had been arrested on *capias ad respondendum* at the suit of Respondents, who subsequently obtained judgment against him, judge SHORT rejected the petition. No reasons are assigned. But it is surmised that he considered himself bound by L. C. Cons. Statutes, ch. 87, sec. 3, inasmuch as the application was made too late, that is, after judgment rendered. Now, if it be once conceded that the sureties who had first entered a security for Defendant's appearance, have a right themselves to apply to the court to give special bail, then I see no difficulty, because the law does not limit the time at which the special bail shall be given, (see ch. 87, sec. 3). It is altogether discretionary, the rule is, that it should be given on the day of the return of the writ, or at any time before the return, or within the eight days next after the day of such return. But the court may, upon special application, and sufficient cause shewn, extend the time of putting in such special bail. The above shews that the judge is not tied down to any time. All depends upon the special application, and sufficient cause shewn. The putting in of special bail does Plaintiffs no harm, and as the statute is one for the relief of debtors, and the liberty of the subject being at stake, it should be carried out on principles of humanity, were there a doubt in the wording of it. However, the section admits of no doubt, therefore, the question simply is as to whether the petitioners shewed sufficient cause to entitle them to the conclusions of their petition. I think they have made out a sufficient case, and that they should have been allowed to put in special bail. The several decisions by judges BADGLEY, MONK, CHABOT, MEREDITH, and the confirmation of the judgment of the latter by the circumstance of the Court of Appeals being equally divided, seem to me to be correct. I am of opinion that the judgment appealed from should be reversed, and the petitioner allowed to put in special bail.

DUVAL, Chief-Justice : The courts are to enforce the law as it is, not to criticize or find fault with it. There may be ambiguity in the statute 12 Vict., in using the words "Special Bail to the Action." I think the use of these words improper ; but under the law as it stands, special bail could manifestly be put in, either under the 5 Geo. IV, or the 12 Vict. The law is plain on that point. In England, where all actions are commenced by *capias*, the bail to the sheriff could put in special bail independently of the Defendant ; if no appearance were put in when the bail was fixed, they could not contest the debt

when sued. The bond was for double the amount of the debt, yet in England the Plaintiff must endorse on the execution the precise amount of the debt. Could this be done here ? I see nothing to authorize such a proceeding. But I think the judgment ought to be reversed on the ground already referred to, namely, that under both the statutes regulating the matter, special bail could be put in.

BADGLEY, J., said : By writ of cap. ad resp., issued out of district court at Sherbrooke, and thereto returned 1st October, 1861, the Defendant Courtnay was arrsted at his residence at Quebec, and gave bail to the sheriff there by whom the writ had been executed. On the 9th October, 1861, Defendant petitioned the court at Sherbrooke to enter special bail, but his petition was rejected absolutely, without time granted or modification of application. On the 17th June, 1862, Plaintiffs obtained judgment against Defendant. On the 13th March, 1863, the sheriff's bail applied to the court at Sherbrooke to be allowed to put in special bail for the Defendant, upon grounds shown, supported by affidavits ; and on the 14th March, 1863, the petition was rejected, the supposed ground being that the statute was positive, and left no room for construction. This appeal is from that judgment. The statute law of Lower Canada has been gradually removing the asperities of the personal imprisonment proceedings against debtors, and at the same time abolishing the speculations upon relatives and friends to pay the debtor's liability, under the barbarous argument of the imprisonment of his body. The present law desires that a debtor should be at large under security to his creditor, rather than that his body should be confined in prison for that security, and in practice the law has provided times within which bail bond should be put in, but the passing beyond the limits of the statute itself is not exclusive of the privilege, if good cause can be shown for the extension, the indulgence of which in this country is provided for by the statute. The english enactments have also a time limited for the purpose, without our statutory provision for the extension of the time, but in England that extension is obtained by the practice of the court, and a judge will always give time upon cause shewn. See 3 Chitty general practice, p. 372. The purpose of our legislation is to put an end to the barbarity of corporeal imprisonment, but at the same time to provide means for the securing as far as may be of the debtor's property for the benefit of his creditors, and finally for punishing him under the justice of the law, not under the vindictiveness of the creditor, for any fraud committed by him against the requirements of the statute in giving up his entire property. The modern imprisonment for debt act 12 Vict., ch. 38, has provided

new legislative remedies for the cases which come within its purview and provisions; it has not abolished the former law with respect to special bail, as permitted by the then law of Lower Canada, the statutory time in that respect being also extendible on good cause shown, so that the former law and the new provisions under the 12 Vict., are both in force, and may be adopted, according to the circumstances of the case. The Defendant having failed by the rejection of his personal application to obtain his rightfult relief under the law, any further application on his part to the same tribunal, made as it must have been beyond the supposed concluded statutory limit, would have been altogether idle; but his bail conceived that they were not thereby excluded from relief, and as sheriff's bail they made application to the same court, also for the purpose of putting in bail for the Defendant, and were as unsuccessful as the Defendant himself. The Defendant's application appears to have been in time, and also appears to have been incorrectly rejected. The question now is, can sheriff's bail themselves put in special bail? Such is the practice in England, from whence we draw our bail proceedings. If Defendant fails to put in bail in due time, the sheriff, or the parties to the bail bond, or the attorney who has undertaken to put in bail, may do so for their own protection, *and by their own attorney*, but it seems not without Defendant's consent, before he has made default. Lush, *Practice*, Sup. Cr. at Westminster, p. 614, See also Archbold's, *Practice*, p. 736. As to the sheriff, it was held, in *Hamilton* vs. *Jones, Pitt et al.*, 6 Bingham's Rep., p. 628, "that the sheriff may even, after he is in contempt for not bringing in the body, put in bail," &c. Ch. J. Tindal says, "the question, therefore, is, whether the practice of the court allows the sheriff to put in bail to protect himself, where the Defendant has failed, and there are several cases which establish his power to do so. Such has been the invariable practice," &c. So, as to Defendant's bail, see *Haggett* vs. *Argent*, 7, Taunt 47, where the bail were permitted to appear by their own attorney." &c. The authorities justify this application of the sheriff's bail; therefore no legal objection could exist to the reception of the petition in this case. In England, even without our special enactments in such cases, the bail may be put in as of right, at any time, either pending the action, or after verdict, and before the Defendant has been actually charged in execution, so as to enable the Defendant to obtain his release, 3 Chit. general practice, p. 372. With the advantage of our law, the Defendant has greater latitude, and the bail should not be treated with more severity than the debtor could be. The only question remaining is as to cause shewn; was it sufficient? It would seem so; under all these circumstances,

the petition should have been granted, because the statute was subject to construction, not as to time, as supposed by the court below, but as to the sufficiency of the ground given, which that court does not appear to have objected to. The judgment of this court will direct the mode and manner of giving the security required by the statute, which has almost in effect abrogated the personal liability of the bail, except of course in the case of the wilful breach by the debtor of the condition of the bond. The object is not to make his bail personally liable for his debt. The object of the law is remedial, and should in all cases be construed with the view of excluding imprisonment. The 21st sec. of the cap. 87, provides not only that nothing shall prevent any person arrested under cap ad resp., from putting in special bail to the action, within the times therein mentioned, but goes further, and provides," but the court may upon special application extend the time for putting in special bail, and also upon special application to allow the arrested person who has given bail to put in security for his surrender, as provided by the 10th sec. of the act, even after the period in that behalf prescribed by that section;" and as Chief Justice Tindal said in *Hamilton* vs. *Jones*, 6 Bingham's Rep., p. 628, " it must be immaterial to the Defendant, whether he is surrounded by one set of bail or the other," and if to the Defendant, it must be equally so to the Plaintiff. The appeal should be maintained.

MEREDITH, J., said: As the main question raised in this cause was fully discussed in the case of Campbell and Atkins, I shall not attempt to go over the ground covered by the very able judgment pronounced in that case by Mr. Justice Caron, but shall confine myself to a brief statement of the reasons which prevent me from concurring in the opinion expressed by the learned judges who were disposed to reverse the judgment of the Superior Court, in the case just mentioned. According to the opinion of those learned judges, a debtor arrested under the 12th Vic., cap. 42, has not a right to give special bail by a bond such as permitted by the 5th Geo. 4, cap 2; that being the law in force on the same subject before the passing of the 12 Vic., cap. 42. On the contrary, according to the opinion of the same judges, as I understand it, every debtor arrested under the 12 Vic., cap. 42, and condemned to pay £20, or more, is bound, if he cannot pay the judgment, to file a statement of his assets and liabilities, such as mentioned in the 4th and 5th sections of the statute, in order that, thereupon, the proceedings for the winding up of the estates of insolvent debtors established by the act, may be had with respect to his property. This opinion, I must say, although I do so with much deference, does not seem to me to be justified

either by the letter or spirit of the law. The primary object of the 12th Vic., cap. 42, as stated in the title, is "*to abolish imprisonment for debt;*" and in the preamble of the statute the legislature have declared that they thought "*desirable to soften the rigor of the laws*" affecting the relation between debtor and creditor, as far as a due regard to the interests of commerce will permit. This declaration sufficiently shews, and I believe it is generally admitted, that the intention of the Legislature in passing the 12 Vic., cap. 42, was not to deprive insolvent debtors of the means which the laws previously in force afforded them of avoiding imprisonment for debt *by giving bail,* but, on the contrary, to afford to insolvent debtors suffering imprisonment *for want of bail,* the means of recovering their liberty, on giving up their estates for the benefit of their creditors. That such was the intention of the Legislature, is, I think, very plain from the whole tenure of the act; but more particularly from the provisions contained in the 12th section. In order, however, to see that section in its true light, it is necessary to keep in mind the general bearing of the other sections of the statute. I shall therefore briefly allude to them. The 1st and 2nd sections determine in what cases writs of *capias ad respondendum* may issue; and, also, do away with the writ of *capias ad satisficiendum.* The 4th and 5th sections authorize proceedings by means of which any debtor arrested under a *cap. ad resp.,* upon filing a statement of his assets and liabilities, and giving up his property, may, after a certain time, obtain his liberation from gaol, without paying the debt for which he was arrested, or giving security of any kind. The 6th and 7th sections provide for the sale of the property given up under the other provisions of the act. The 8th section makes provisions for debtors not arrested by *capias ad respondendum,* but who, were it not for the passing of the act, could be proceeded against by *capias ad satisficiendum,* and affords to those persons also, on giving up their property, the means of obtaining their discharge from imprisonment. The 9th and 10th sections have reference to persons arrested before the passing of the act. The 11th section declares that the discharge of the person of a debtor, under the statute, shall not extinguish his debts. Then we arrive at the 12th section, upon which the present case turns, and which I propose to give at full length, without referring to the remaining five sections of the statute, which have no bearing upon the present case. Section 12 is as follows: "And be it enacted, that nothing in "this act contained shall prevent any person arrested under "a writ of *capias ad respondendum from putting in special* "*bail to the action, as permitted by the laws of Lower Canada* "*now in force,* excepting only that such special bail shall not

" be received unless put in on the return day, or at any time " before the return day, or within the eight days next after " the return day; provided always, that it shall be in the " power of the court, upon special application and sufficient " cause shewn to extend the time for putting in such special " bail: and it shall also be in the power of the court, upon " special application and sufficient cause shewn, to allow any " Defendant arrested, and who shall have given bail for his " appearance at the return of the writ, to put in security that " he will surrender himself as provided by the third section " of this act, even after the period in that behalf prescribed " by the said third section of this act." Thus we see that the Legislature after having, by the first two sections of the statute, declared in what cases a writ of *capias ad respondendum* may be sued out; then by the next nine sections provided means, by the observing of which any debtor arrested under a *capias ad respondendum* can, on giving up his property, regain his liberty, although the claim for which he may have been arrested remain unsatisfied. The legislature have, by these provisions, as they intented, very materially " softened the rigor " of the law as regards that class of debtors who were liable to be confined in prison for want of bail; but there was another, and every lawyer knows, a much more numerous class of debtors, who previously to the passing of the act, had the means of avoiding imprisonment by giving *special bail to the action;* and, as it certainly was not the intention of the Legislature to make the more numerous class of debtors suffer, in order to afford indulgence to another and less numerous class, the framers of the statute, true to the intention of *softening the rigor* of the law, proclaimed in the preamble, caused the nine sections of the statute, (from 3 to 11 inclusively) which afford relief to one class of debtors, to be followed by the twelfth section, which prevents the previous sections from increasing the severity of the law, as against any class of debtors. Were it not that a contrary opinion is entertained by persons for whose views I have the highest respect, I should think it beyond doubt that, under the 12th section of the 12th Victoria, cap. 42, a debtor arrested has now a right to put in special bail, *exactly as he could have done,* and with *precisely the same effect,* as if that statute had never been passed; excepting of course that by the proviso in that section the time for putting in such special bail is limited. What other meaning, I ask, can be given to the words, " That nothing in this Act contained shall prevent any " person arrested under any writ of *capias ad Respondendum* " from putting in special bail to the action, as permitted by " the laws of Lower Canada now in force," the law then in

force and applicable in such cases being, as shewn by Mr. Justice Caron, and, as is quite certain, the 5th George IV, cap. 2. Do not we see that the Legislature in one part of the section speak of "*special bail to the action*," a proceeding which, for centuries, has been familiar to all English lawyers, and that towards the close of the section the Legislature speak of "*security to surrender*," "as provided by the third section of this act;" a proceeding established for the first time by the act itself. Do we not, also, see that the Legislature have thought fit in one part of the section to limit, subject to a proviso, the time within which *special bail to the action* is to be put in, and in another part of the same section to limit, subject to a proviso, the time in which *security to surrender* "under the third section of this act" is to be given. How then can we be asked to hold, as I understand we are, that the old proceeding of "*special bail to the action*," and the new proceeding, "*security to surrender*" under the third section of the act, are in effect one and the same proceeding, or, at any rate, that a Defendant arrested under a writ of *capias ad Respondendum* cannot now put in *special bail* to the action, as he could have done before the passing of the statute. It may however be said, and, indeed, has been said, that although the Legislature have declared that special bail to the action may be put in, yet that they have not said that such special bail shall be received *instead of security to surrender*, as provided by the third section of the statute, or that special bail shall have the effect of discharging the bail to the sheriff. But in my opinion such a declaration was altogether unnecessary. The Legislature having expressly reserved to a debtor arrested the power of putting in special bail, and having given the court the power of enlarging the time allowed for that purpose, did not mean and could not by any possibility have meant that the putting in such special bail should be an idle, purposeless formality; on the contrary, the special bail which the Legislature have thus permitted to be put in, must have the legal effect which such bail always had, namely, that of discharging the bail to the sheriff. As this part of the case, according to my view, is sufficiently plain, I shall now pass to the consideration of some of the points to which our attention was particularly drawn in the course of the argument before us. It was contended by Respondent, that after final judgment rendered in the original suit, the Court had no longer power to allow bail to be put in. But there is not one word in the statute tending to subject the power of the Court to the limitation thus contended for, and it is plain that if this pretension of the Respondent be well founded, it would follow, that if a Defendant thought fit to

confess judgment, the parties to the suit might, even during the eight days allowed by the statute, deprive the bail to the sheriff of any opportunity of applying for an extension of the time to put in special bail. It was also argued that the application to extend the time for putting in special bail ought to have been made before that delay had elapsed, and that after that time had gone by, the Court had *no power* to allow special bail to be put in. This objection was strongly urged and formally overruled in Campbell and Atkins; and in addition to the reason given by Mr. Justice Caron, in that case, I may observe that the interpretations which the Respondents wish us to put upon the proviso in the 12th section of the 12th Victoria, cap. 42, is contrary to the interpretation which our Courts have invariably put upon other provisions of law of the same character. For instance, in the 25th section of the 12th Vict., cap. 38, it is declared: "the Defendant shall be " allowed *eight clear days* from the appearance to plead to " the declaration;" and in the next section it is declared " that the delay for pleading *may be enlarged* by the Supe- " rior Court, or by any judge thereof, on special application." Now I am not aware that it has ever been held, or even contended, that an application to *enlarge* the time to plead must be made within the statutory delay of eight days; and we know that the uniform practice of all the Courts is against such a pretension. I may, as to this point, add, that if the view now being considered be well founded, then, if the bail to the sheriff were prevented even by sudden sickness, or by the fraud of the Plaintiff, from asking for an enlargement of the delay within the eight days allowed by the statute, the Court would be *without power* to afford them relief. The Respondents, naturally anxious to take this case out of the ruling in Campbell and Atkins, have said that the present case differs entirely from Campbell and Atkins, inasmuch as, in that case, "the permission of the Court had been granted to the Defendant, upon his application, while here he has made no application." The difference thus pointed out between the present case, and the case of Campbell and Atkins, is unimportant, because it is indisputable that bail to the sheriff have a right to put in special bail for their own protection. Petersdorff (1) expressly says so at p. 282; at the close of the same page, the author adds, " and it is now a settled principle that the *bail below* may appear and justify by their own attorney." The objection urged at the argument, that the Appellants are not parties in the original suit, does not seem to me of importance, because it is sufficient for the Appellants to show that

(1) Petersdorff, on Bail, p. 282.

they are aggrieved by the judgment of which they complain. Upon the whole, the case seems to me to be, in principle, the same as the case of Campbell and Atkins; and believing, as I do, the judgment in that case to be in all respects well founded, I think that the judgment now under consideration, which is opposed to it, must be reversed.

The judgment is as follows: Considering that, by the law in force in Lower-Canada, a Defendant who has been arrested by virtue of a writ of *capias ad respondendum* issued out of a court of competent jurisdiction in Lower Canada aforesaid, and who has given bail to the sheriff for his appearance at the return of the writ, may put in special bail or security at any time, upon special application therefor to the court out of which such writ issued, upon sufficient cause shewn, to the satisfaction of the court, for extending the time of putting in such bail; considering that by the law aforesaid the condition of the recognizance of the said bail or security is that the cognizors thereof shall not become liable unless the Defendant shall leave Lower Canada aforesaid, without having paid the debt, interest and costs for which the action shall have been brought; considering that the bail to the sheriff given by such Defendant arrested as aforesaid, have by law a right to put in such bail or security aforesaid, upon the failure or default of such Defendant to put in the same; considering that in the judgment pronounced by the Superior Court for Lower Canada, sitting at Sherbrooke, on the 14th day of March, 1863, rejecting the petition and application of the Appellant, petitioner in the Court below, to put in bail and security for De Courtney, Defendant in the Court below, in the action referred to, and mentioned in the petition, the action instituted by Respondents, Plaintiffs in the Court below, against Defendant, and in which Respondents, Plaintiffs aforesaid, obtained judgment from the said Court below, against Defendant, there is error; this court doth reverse and set aside the said judgment, and proceeding to render the judgment which should have been pronounced by the Court below upon the petition and application of petitioner, doth maintain the same, and doth order that petitioner, shall be at liberty, at any time of the first regular session of the said Superior Court, at Sherbrooke, sitting after one month from the pronouncing of this judgment, to put in before the said court special bail or security to the satisfaction of the said court, for De Courtnay, Defendant aforesaid, the condition of the recognizance therefor to be that the said bail or security shall not become liable unless the Defendant shall leave Lower Canada without having paid the debt, interest and costs for which the said judgment has been rendered against

him at the suit of the Respondents, Plaintiffs aforesaid, &c. (14 *D. T. B. C.*, p. 239, et 9 *J.*, p. 265.)

ANDREWS and ANDREWS, for Appellant.
SANBORN and BROOKS, for Respondent.

PARTAGE.—ACTION EN REINTEGRANDE.

BANC DE LA REINE, EN APPEL, Montréal, 1 mars 1864.

Présents : DUVAL, MEREDITH, MONDELET et BADGLEY, Juges.

LEFEBVRE DE BELLEFEUILLE *et al.*, Appelants, *et* GLOBENSKY *et al*, Intimés.

Jugé : Que, dans un partage de fief, avec stipulation que les revenus d'un moulin construit sur la part d'un des co-partageants se partageraient suivant leurs parts respectives, jusqu'à ce que le propriétaire du fonds eût remboursé à son co-partageant la valeur de sa part dans le dit moulin, ce dernier a droit de réintégrande pour être remis en possession de son droit de percevoir sa part des revenus du dit moulin, le propriétaire du fonds ne lui ayant pas remboursé la valeur de sa part de tel moulin.

L'Appel était institué d'un jugement rendu comme suit, par la Cour Supérieure, Montréal : " The Court, considering " that, in the *Acte d'accord, pour tenir lieu de partage, entre* " *les deux familles Dumont et De Bellefeuille. de l'augmenta-* " *tion de la seigneurie des Mille-Isles*, dated twenty-seventh " december, 1843, and passed before Globensky, and colleague, " notaries public, the following clause occurs, and is therein " and thereby agreed upon as part of said *Acte d'accord :* " *Quant aux moulins qui se trouvent par la ligne commen-* " *cée, être érigés sur la partie échue à la famille Dumont, il* " *est entendu que les revenus du moulin à farine resteront* " *en communauté, c'est-à-dire, que la famille Dumont, en* " *percevra les deux tiers, et la famille De Bellefeuille le* " *troisième tiers, jusqu'à ce que la famille Dumont rembourse* " *à la famille De Bellefeuille, le tiers de la valeur des dits mou-* " *lins, et ses ustensiles, tournants et travaillants, au dire d'ex-* " *perts choisis par les familles Dumont et De Bellefeuille, et* " *que le moulin à scie restera au profit de la famille De Belle-* " *feuille, jusqu'à ce que la famille Dumont lui ait remboursé* " *et payé la valeur de la dite bâtisse, et ses dépendances, aussi* " *au dire d'experts choisis par les familles De Bellefeuille et* " *Dumont :* Considering that, by law, the breach of such sti- " pulation does not render Defendants liable to be impleaded " by an action *en réintégrande :* Considering, moreover, that it " appears, by the evidence adduced, and by the admissions " contained in Plaintiff's declaration, that no *partage* of the

" mill, premises and dependences had ever been made, entered " into or affected by Plaintiffs and Defendants, or by their pre- " decessors, *auteurs:* Considering, on the contrary, that it " results, from the evidence adduced, that the mill, premises " and dependances, were, at the time of and previous to the " institution of the present action, the property of Plaintiffs " and Defendants, and were by them held *par indivis*, and " the revenues thereof were to be divided into the proportions, " and appropriated as in and by the said *acte d'accord* was " agreed upon; and, moreover, considering that, by the *bor-* " *nage* and division of the continuation of the seigniory of " Mille-Isles, it appears that the mill in question is built upon " and is situated upon that part of the continuation of the " seigniory which belongs to Defendants, in pursuance of said " *bornage* and division. Seeing, therefore, that no action such " as that instituted by Plaintiffs against Defendants in the " present instance, would or can by law be maintained against " Defendants, for the causes, matters and things set forth and " contained in Plaintiffs' declaration: Considering that Plain- " tiffs have failed to prove the material allegations of their " declaration, and that Def ndants have established, by legal " and sufficient evidence, the averments of the plea, *exception* " *péremptoire* by them filed and pleaded in this cause, and " that the pleas styled *exceptions péremptoires*, are well found- " ed in fact and in law, doth maintain the pleas of Defendants, " and doth dismiss Plaintiffs' action, with costs."

MONDELET, juge, *dissentiente:* Après avoir lu tous les documents, pièces et preuve, je n'hésite aucunement à exprimer mon opinion, que les Appelants n'avaient aucun droit d'intenter contre les Défendeurs une action en réintégrande, attendu qu'il a été constaté que le moulin à farine dont il est question, est situé dans la partie de l'augmentation de la seigneurie des Mille-Isles, qui est, par le partage qui a suivi l'acte d'accord du 27 décembre 1843, et l'opération de Laurier arpenteur, dans le lot des Défendeurs, les Appelants n'ont eu aucun droit ni au fonds, ni à la possession, du moulin en question. Les Demandeurs n'ont droit qu'à un tiers des revenus, ce qui n'a aucun caractère de droit à la réalité, mais donne lieu, tout au plus, à une action personnelle contre les Défendeurs pour le tiers des revenus du moulin, si ces derniers sont en défaut d'accomplir, à cet égard, leurs obligations envers les Demandeurs. Je pense donc que l'action des Demandeurs a été bien et dûment déboutée, par le jugement bien motivé de la cour de première instance, qui devrait être confirmé.

BADGLEY, Justice, giving the judgment of the court: By the will of the late M. Dumont, proprietor of the seigniory of Mille Isles and the continuation thereof, dated 11th October,

1805, he devised that property to his son and daughter, with substitution to his grand and great grand children, and directed it to be divided betweeu them according to law, by arbitrators to be appointed by the devisees. At the outset, it is proper to state that Respondents, Defendants, represent the descendants of the *grevé*, the son, and known as the Dumont family, and Appellants, Plaintiffs, those of the daughter *grevée*, and known as the DeBellefeuille family. On the 4th of July, 1807, agreement to effect partition was executed, and arbitrators were named. On the 4th and 5th January, 1808, the award of arbitrators was rendered, whereby among other things, the continuation of the seigniory was divided into two portions respectively of 2/3 and, 1/3, the former for the Dumont family, the latter for the DeBellefeuille family, the former, the lands to the N. E. with 2/3 of the domain, namely 8 arpents in front by 30 in depth, with all the buildings erected on this portion, and the latter the lands to the S. W. with 1/3 of the domain, namely, 4 arpents in front by 30 in depth, with all buildings erected on said latter portion. In an action of partition in which the two interested families were represented, a judgment by consent was rendered on the 12th October, 1839, which ordered the division line between the two portions to be established by a surveyor, and Laurier was named therefor. The surveyor proceeded with his operation and drew the line to some extent in the said continuation of seigniory, when, on the 27 December, 1843, by deed of agreement, the parties having declared their intention to have and enjoy their respective portions apart and separate, adopted the division line commenced by Laurier, in its then extent, and agreed that it should be extended to the seigniorial line, and at the same time recognized the family portions of 2/3 to the N. E. of the line, and 1/3 to the S. W. of the line, as directed by the award. It was also specially agreed between them as part of this final settlement of their respective portions, and the following clause occurs and is therein and thereby agreed upon, as part of said *acte d'accord: Quant aux moulins qui se trouvent par la ligne commencée, être érigés sur la partie échue à la famille Dumont, il est entendu que les revenus du moulin à farine resteront en communauté, c'est-à-dire, que la famille Dumont en percevra les deux tiers, et la famille DeBellefeuille le troisième tiers, jusqu'à ce que la famille Dumont rembourse à la famille DeBellefeuille le tiers de la valeur des dits moulins, et ses ustensiles, tournants, et travaillants, au dire d'experts choisis par les familles Dumont et DeBellefeuille, et que le moulin à scie restera au profit de la famille DeBellefeuille, jusqu'à ce que la famille Dumont lui ait remboursé et payé la valeur de la dite bâtisse, et ses*

dépendances, aussi au dire d'experts choisis par les familles DeBellefeuille et Dumont. On the 16th September, 1844, Laurier completed the *bornage* by the prolongation of the line previously commenced by him to the line of the seigniory, as shewn in his *procès-verbal.* From this time, the two families *appear to have* held the flour mill jointly, and to have taken and received the revenues harmoniously according to their respective proportions, until 21st January, 1856, when a protest was made by the Dumont family against the DeBellefeuille family, alleging that, by reason of the refusal of the latter to name *experts* to value the flour mill, the former tendered to the latter a sum of money as the 1/3 of said value, required the latter to appoint and agree upon *experts* to establish the valuation, and, on their default so to do, within 15 days, that the former would withhold the entire revenues of the mill from the latter. On the 21st. May, 1856, the miller, Marie, having by Defendant's directions, refused to pay over to Plaintiffs their usual share of the revenues Defendants having assumed the entire control of the flour mill, Plaintiffs protested against the miller, requiring him to render account of the revenues of the mill from the 8th March then last, and on the 29th May, 1856, Plaintiffs protested Defendants &c., requiring them to meet Plaintiffs in the mill on the 3rd June following, to establish their division of the revenues, and to intimate their insistance upon entrance into the mill. Nothing came of these protests and counter protests, except the usual result, a suit at law, instituted by Plaintiff's against Defendants, in which the former allege their possession of the mill *par indivis* with Defendants, receiving there from ⅓ of its revenues; that they were troubled in their possession by Defendants, which possession they had held for more than 10 years to the 21st January, 1856, of ⅓ thereof, and that the trouble was done within a year and day of the institution of the suit; wherefore they prayed the ordinary conclusions of a possessory action, the maintainance of their possession, the cessation of the trouble, and £200 damages. The pleading of Defendants is substantially petitory, title under the will and agreement above detailed, claiming absolute sole property in the mill in question, and alleging their sole possession of it, finally objecting that the special agreement in the *acte d'accord* was not a real right in the mill or its revenues, but only personal, for a division of the latter wherefore *actio non.* It is in evidence that Plaintiffs were in possession of the mill on the 21st January, 1856; that, several years before, Plaintiffs and Defendants together joined in a *contrat* of engagement with Marie the miller, whereby he was to work the mill for them, receive the revenues and pay them proportionally to the res-

pective parties; that the miller had acted under that engagement for five years; that, before said date, 21st January, Plaintiffs had always been in the peaceable possession of the mill, as co-proprietors with Defendants, receiving their share of revenue, when, about that time, Defendants ordered the miller to pay no more of the revenues to Plaintiffs as before, which he obeyed, Defendants assuming the entire control, declaring that Plaintiffs *n'avaient plus d'affaire dans le moulin.* It is elementary to say that a partition of realty effected and completed by the definition of limits and boundaries, makes the previous proprietors *par indivis* separate proprietors of their respective portions, as settled by the terms of their deed of partition namely, the agreement or *acte d'accord* in this case, which related back the several titles of the parties to the common title under which they jointly held the property. It would, notwithstanding, be subject to the legal effect of any special stipulation or condition contained in the *acte* whereby the entire separate portion, or any part thereof, might be affected, controled or limited in possession or enjoyment by the party to whom it had fallen by the agreement or *accord.* Without such a special reservation or limitation, the possession would necessarily have been as absolute as the title, but with such a special agreement in the *acte d'accord for the partition generally,* it specially regarded the flour mill, and, therefore, it is necessary to ascertain its legal effect in connexion with the circumstances of the case, as shewn in evidence and affecting Defendants. Now, the *acte d'accord* between the parties did establish the partition of the respective lots, but, at the same time, it declared that, as to the mills, which, by the line had been found to be erected upon the portion fallen to the Dumont family, it was agreed that the revenues of the flour mill *resteront en communauté,* shall continue in common, that is to say, the Dumont family *percevra,* shall take and receive ⅔, and the De Bellefeuille the other ⅓ until &c. and that the saw mill *restera au profit de la famille DeBellefeuille,* shall continue for the sole profit of the De Bellefeuille family until &c., in both cases, the happening of certain conditions, namely, not only the ascertainment of the experted values of the two mills, but, still more, the actual payment by the Dumont family to the De Bellefeuille family of ⅓ of the value of the flour mill property, and the entire value of the saw mill property. The legal interpretation of the special stipulation is in itself; the effective words of the stipulation are in the continuance of the possession and enjoyment which Plaintiffs, at the date of the *acte d'accord,* had jointly with Defendants in the flour mill until the accomplishment of the stipulated conditions, as to the value of the property

respectively; and the same stipulation which continued to plaintiffs the entire possession of the saw mill for their sole profit, continued to them the joint possession of the flour mill for their perception of the ⅓ of its revenues. It is not easy to discover a different application of this legal limitation of property as it relates to the flour mill, than as it relates to the saw mill. Where parties agree to take and receive the revenues of real property according to certain proportions for each, without any stipulation as to the possession by either, of the common producer, they hold, as joint tenants in possession, each having a *jus in re* to the extent of his share; and so, in this case, the parties themselves so considered their possession, because Marie asserts that they mutually engaged him to take charge of the flour mill, the common object, and to receive for them their common revenues. " Les fruits de la chose possédée sont divisibles; mais cette division matérielle des fruits n'est possible qu'après que les fruits ont été recueillis; jusque-là, la possession a été fait commun, s'appliquant à toute la chose commune, et à chaque partie de cette chose: la possession quand la part de chacun n'est pas matériellement faite est donc une chose essentiellement indivisible." (1) The right of Plaintiffs truly is not that of absolute proprietor, but it is that of: " Possesseurs précaires, qui jouissent en vertu d'une " concession, mais qui ne dépouillent pas absolument le pro-" priétaire, et laissent entre ses mains un droit supérieur que " le concessionnaire doit respecter, &c. Cependant il ne faut " pas prendre à la lettre ces termes de la loi, *à titre de pro-" priétaire, à titre non précaire,* pour en conclure que les pos-" sesseurs dont on vient de parler ne peuvent exercer l'action " possessoire: pour être privé de cette action il faut n'avoir " aucun droit réel dans la chose. Il n'en est pas de même de " l'usufruitier, de l'usager, du possesseur d'une servitude " légale ou conventionnelle, &c. Ceux-ci ne possèdent pas, il " est vrai, comme propriétaires absolus; ne pourraient agir au " possessoire pour se faire maintenir dans la possession à titre " de propriété, mais ils n'en ont pas moins un droit dans la " chose, *jus in re;* la propriété est démembrée à leur égard, en " quelque sorte, et tout en reconnaissant un droit supérieur, ils " ne sont pas moins admis à l'action possessoire, etc." (2) Curasson has extracted the above almost entirely from Troplong, *Traité de Prescription,* and adds: " la possession se continue " telle qu'elle était à son principe: que c'est par son origine que " sa qualité demeure fixée, et que nul ne peut s'en changer la " cause à lui-même," and Troplong himself admits that this

(1) Caron, *Actions Possessoires,* pp. 812, 813.

(2) Curasson, *Actions Possessoires,* p. 97 et suiv.

possession, *jus in re,* "est chez nous une opinion la plus *ré-*
" *pandue :* elle est enseignée par Poncet et Duranton ; on la
" trouve dans tous les livres et dans tous les arrêts. Domat,
" guide assez ordinaire de nos auteurs modernes, en est le
" partisan, etc.," but, notwithstanding he combats all this legal
host, this universal *jurisprudence,* and asserts that it is a
mere fact, and, yet, after exhibiting his usual *controversialism*
against every legist and every *arrêt,* he concludes : " mainte-
' nant, si l'on nous demande dans quelle classe nous rangeons
les actions possessoires, nous répondrons sans hésitation et
sans scrupule, que nous les considérons comme dans la
famille des actions réelles," Troplong, *Prescription ;* and
Caron, *Actions possessoires,* p. 811, says : " notre droit n'ad-
" met pas les subtilités du droit romain, et la Cour de cassa-
" tion a toujours admis la complainte dans le cas de possession
" commune, cela nous paraît exact. Ainsi, si deux co-héritiers,
" propriétaires d'une maison qu'ils se sont divisée, sont conve-
" nus de jouir en commun de la cour qui en dépend, et que l'un
" d'eux soit troublé par l'autre dans cette possession commune,
" il pourra se plaindre ; car, quelle que soit l'étendue, la nature
" de sa possession exclusive ou commune, du moment qu'en
" fait elle existe, s'il est troublé dans cette possession, il doit
" être admis à demander qu'on le maintienne dans son droit
" de possession, tel qu'il l'exerçait ; et c'est avec raison que la
" Cour de cassation a décidé qu'il pourrait en ce cas intenter
" l'action possessoire contre son co-possesseur qui le trouble,
" ou qui essaie de s'attribuer la possession exclusive de la
" chose commune," and the same author says, at p. 812. " En
" principe, l'action possessoire ne peut appartenir qu'à celui
" qui a la pleine disposition de la chose, qui est maître de la
" chose. Mais il est de principe aussi que chaque propriétaire
" d'une chose indivisible peut intenter toutes les actions rela-
" tives à cette chose, comme un seul est tenu pour tous. La
" question est donc de savoir si la possession d'une chose indi-
" vise est une chose indivisible. L'article 1217 du code civil
" répute indivisible la chose qui dans sa livraison ou le fait
" qui dans l'exécution n'est pas susceptible de division, soit
" matérielle, soit intellectuelle. Or, cela peut-il se dire de la
" possession ? Les fruits de la chose possédée sont divisibles ;
" mais cette division matérielle des fruits n'est possible qu'a-
" près que les fruits ont été cueillis ; jusque là la possession a
" été un fait commun, s'appliquant à toute la chose commune,
" et à chaque partie de cette chose ; la possession, quand la
" part de chacun n'est pas matériellement faite, est donc une
" chose essentiellement indivisible." Savigny, *Traité de la
Possession,* p. 570. " Toute construction est considérée comme
" partie du sol sur lequel elle repose, et sa propriété comme sa

" possession, sont intimement liées à la propriété et à la possession du sol. La seule séparation possible consiste en une " espèce particulière de *jus in re* que le propriétaire peut " transmettre à un autre. Celui qui a ce *jus in re* n'est pas " plus possesseur que propriétaire de la maison, mais il a une " *juris quasi possessio*, et par là les actions possessoires. Cette " *juris quasi possessio*, a une très grande ressemblance avec la " possession des servitudes personnelles, parce que, comme " celle-ci, elle dépend de la possession naturelle de la chose " elle-même. Il n'existe aucune différence quant à l'acquisition " et à la perte de la possession, et en existât-il dans les interdits, elle n'est du moins pas pratique." The right of possession of Plaintiffs, under the circumstances of the case, whether it be a mere fact or of law, whether settled and stipulated for by the *acte d'accord* as a limitation of the full and absolute property in the mills, until the arrival of the contingency of their experted values of those properties being ascertained, and the completion of that contingency, by the payment of the agreed values by the Dumont family to the De Bellefeuille family, or whether considered legally as a *jus in re*, according to the current of legists and of *jurisprudence*, was in Plaintiffs a *jus in re* in the flour mill in question in this case, which they had substantially possessed and enjoyed before and at the date of the *acte d'accord*, December, 1843, and which under that accord they continued to possess until Defendant's *trouble* in january, 1856. That possession was manifestly sufficient to give them possessory rights and to enable them to maintain them by a possessory action, and although the case does not present the features of absolute divestment required to sustain an action of *réintégrande*, as considered by the judgment of the Superior Court, it does possess the attributes and privileges of an action *en complainte*, and therefore the absolute dismissal of this action does appear to be incorrect.

" The Court, considering that, on, and for many years previous to the 27th day of december 1843, to wit, the date of the *acte d'accord pour tenir lieu de partage entre les familles Dumont et De Bellefeuille, de l'augmentation de la seigneurie de Mille-Isles*, the families of Dumont and De Bellefeuille were the legal owners and possessors *par indivis* of the said augmentation, which, under and by virtue of the stipulations contained in the said notarial *acte*, the two families did agree to divide and partition among them, according to their respective rights, under and by virtue of the will of Louis Eustache Lambert Dumont, their common ancestor and devisor. And, considering that it was specially and expressly stipulated by the families, parties thereto, now represented by the respective parties in this cause, to wit, the Dumont family repre-

sented herein by Respondents, Defendants in the court below, and the De Bellefeuille family, by Appellants, Plaintiffs in the court below, in manner following; that is to say: " Quant aux " moulins qui se trouvent par la ligne commencée être érigés " sur la partie échue à la famille Dumont, il est entendu que " les revenus du moulin à farine resteront en communauté, " c'est-à-dire, que la famille Dumont, en percevra les deux " tiers, et la famille De Bellefeuille, le troisième tiers, jusqu'à " ce que la famille Dumont rembourse à la famille De Belle- " feuille le tiers de la valeur des dits moulins, et de ses usten- " siles, tournants et travaillants, au dire des experts choisis par " les dites familles Dumont et De Bellefeuille, et que le moulin " à scie restera au profit de la famille De Bellefeuille jusqu'à " ce que la famille Dumont lui ait remboursé et payé la valeur " de la dite bâtisse et ses dépendances, aussi au dire des " experts choisis par les dites familles De Bellefeuille et Du- " mont." Considering that, in and by the said special stipulation and agreement the De Bellefeuille family, to wit, Appellants, had in law the possession of, and a possessory right, *jus in re*, in and to the one undivided third part of the flour mill in the said special stipulation mentioned, the object of contestation in this cause, wherein Appellants could not legally be troubled, *troublés*, and whereof they could not legally be divested by Respondents, representing the Dumont family, except after the entire fulfilment of the condition in respect of the flour mill stipulated in the said special agreement, or by a judgment rendered therefor by a court of competent jurisdiction: Considering that Respondents did, on the 21st day of January, 1846, illegally and wrongfully trouble, *troublé*, Appellants in their lawful possession of the one undivided third part of the flour mill, and did, illegally and wrongfully, dispossess and divest them of their said possession and possessory right therein: Considering that the possession and possessory right of Appellants was sufficient in law for the maintainance of their possessory action by them instituted against Respondents: Considering that Appellants have a right to have and receive the one third part of the revenues of the flour mill, so long as their possession and possessory right shall exist: Considering that, in the judgment pronounced by the Superior Court of Lower Canada, at the City of Montreal, on the 20th day of June, 1861, whereby the action of Appellants has been dismissed, there is error: This court doth reverse and set aside the said judgment, and proceeding to render the judgment which the court below ought to have rendered, doth maintain the action of Appellants, Plaintiffs in the court below, against Respondents, Defendants in the court below, and doth declare that Appellants, are and were the legal possessors of, and had

a possessory right in, the one undivided third part of the flour mill situated at St. Jerome, on the North River, in the village and parish of Saint Jerome, in the seigniory of Mille-Isles, and, inasmuch as Respondents did, on the 27th day of January, 1856, illegally and wrongfully, trouble, *troublé*, Appellants, in their possession and possessory right, and did illegally and wrongfully dispossess and divest them thereof, the court doth order Respondents, to render and restore to Appellants, the full and entire possession of the one undivided third part of the said flour mill, within twenty days after service upon Respondents, of this judgment, and, upon their failure so to do, that the said rendering and restoration to Appellants of said possession, shall be effected in manner provided by law, and that Respondents, thereafter do not trouble, *troubler*, or molest Appellants, in their possession, and possessory right of the same; and the Court doth further order, for the purpose of ascertaining the amount of the said revenues, which Appellants, are justly entitled to have and receive from Respondents, up to the time of the service of the said judgment, that, by *experts* to be named and appointed by Appellants, and Respondents, respectively, within twenty days from and after the signification by the one upon the other of the parties, of this judgment, and, on failure and default of one or both of the parties so to do, then by the Superior Court, or a Judge thereof, with power to the two *experts* to name a third, in case of difference of opinion between the two, the net revenues of the flour mill shall be ascertained and established in presence of the parties, or them duly called therefore, and the one third part thereof belonging to Appellants, shall be settled and determined, and shall by the *expertise* be awarded to Appellants, and the *experts* shall make and render to the Superior Court, their report in the premises, without delay, to be then proceeded upon by the Superior Court, as to law and justice shall appertain, with costs, &c. (14 *D. T. B. C.*, p. 260.)

STUART, HENRY, for Appellants.

CARTIER and POMINVILLE, for Respondents.

SAISIE-EXECUTION.—SHERIF.—GARDIEN.—HUISSIER.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 22nd June, 1862.

Before: Sir L. H. LAFONTAINE, Bart., Chief-Justice, MEREDITH, MONDELET et BADGLEY, Justices.

DINNING, Appellant, *et* OLIVER, Respondent.

Dans cette cause le shérif, par son retour à un writ de saisie-arrêt émané en 1857, certifia, "qu'il avait saisi entre les mains d'Edward Oliver, le Défendeur, un certain vaisseau appelé le *Melbourne*," tel que mentionné dans le procès-verbal de saisie annexé à son rapport, et par le procès verbal il apparaissait que François Langlois et Jean Lachance, étaient les gardiens.

Subséquemment, sur rapport du *venditioni exponas*, émané en 1860, dans la même cause, le shérif certifia que l'intimé avait été nommé gardien, sous le dit writ de saisie-arrêt ainsi émané en 1857, mais il ne fit pas rapport du procès-verbal constatant la nomination de l'intimé comme gardien.

Jugé, dans la Cour Supérieure : Que le shérif après son rapport d'un writ de saisie-arrêt simple, est *functus officio*, et ne peut par après exercer aucune autorité sur la saisie pratiquée par lui, pas même quant à la nomination d'un gardien volontaire au lieu d'un gardien à gages.

Dans la Cour d'Appel : 1o Qu'il n'appartient pas et qu'il n'est pas du devoir d'un huissier employé par le shérif de faire rapport à la Cour de ses procédés en vertu du warrant du shérif, et que si tel rapport est fait à la Cour, icelui sera considéré comme non officiel, et partant comme non authentique.

2° Que l'énoncé ainsi fait par le shérif dans son rapport au writ de *venditioni exponas*, en 1860, ne constatait pas d'une manière légale la nomination de l'intimé, comme gardien en vertu du writ de saisie-arrêt.

The Appellant, having brought suit against one Oliver, and sued out a writ of *arrêt-simple* before judgment, caused a vessel of Defendant, called the Melbourne, to be attached under this writ; upon this attachment being made, two guardians were appointed, namely, François Langlois and Jean Lachance, it appeared that, subsequently, Respondent was appointed as voluntary guardian in this cause. The Plaintiff, having obtained judgment against Defendant for a sum of £704 9 7, and the attachment having been declared good and valid, sued out a writ of *venditioni exponas;* upon this writ, the sheriff, subsequently, made his return, to the effect that the guardian, the Respondent, had neglected and refused to deliver the vessel seized. Upon this Plaintiff then moved the court below for a *contrainte* in the following terms: "That, inasmuch as (as appears by the return to the writ of *venditioni exponas*) Thomas Hamilton Oliver, of Quebec, merchant, the *gardien* of the ship or vessel called the Melbourne, seized under the writ of *arrêt-simple* in this cause issued, hath neglected and refused to deliver over to the sheriff the ship Melbourne, and has thereby prevented the sheriff from effecting a sale of the ship, as the sheriff was commanded to do by the

writ of *venditioni exponas;* and, inasmuch as Oliver, being *gardien*, as aforesaid, sent, or permitted the vessel to be sent out of the province of Canada, and to parts beyond the seas, and beyond the jurisdiction of this court, and which vessel is of the value of two thousand pounds currency, and upwards, a *contrainte par corps*, do issue against Oliver, and that he be imprisoned in the common goal of this district, and there detained, until he shall have produced and delivered to the sheriff the ship or vessel called the Melbourne, and paid the costs hereupon incurred; and that, in the event of Oliver showing that he cannot produce the vessel, that he be detained in the common goal of this district until he shall have paid to Plaintiff the sum of £704 9 7, currency, with interest on the said sum from the twenty-ninth day of October, 1858, and costs of suit, taxed at the sum of £30 9 5, with the sum of sixteen shillings and six pence, the sheriff's costs on the writ of *venditioni exponas*, and the costs of the present motion, and of the writ of *contrainte par corps*." And a rule *nisi* having been granted, Respondant was served personally with the same, as well as with an affidavit shewing the value of the vessel, and that she was suffered by Respondent to leave the province in the fall of 1857. The rule having been returned, the following order was made on the 3rd April, 1861: "The court, doth order, *avant faire droit*, that Plaintiff establish, in evidence, *contradictoirement* with the guardian, the value of the ship or vessel called the Melbourne, whereof Oliver hath been appointed guardian, with costs of the said proceedings against the guardian." Subsequently, Appellant proceeded to establish, by evidence, the value of the Melbourne, and the parties having been heard, the following judgment was rendered: "The "court, considering that the sheriff, by his return to the writ "of *arrêt-simple*, returns that he named two guardians, other "than Thomas Hamilton Oliver, and that, after the return of "the said writ, with his return thereto, the sheriff was *functus* "*officio* in relation thereto, and had no authority over the "seizure already made by him; considering, moreover, that "the certificate of the bailiff attached to the said writ and "return, and dated after the return of the said writ into this "court cannot be looked to, and is without legal effect; con- "sidering that there is no legal evidence of Oliver having "been named guardian by any person having a right to name "him, doth dismiss Plaintiff's motion for *contrainte par corps*. "and the rule thereupon obtained, with costs against Plaintiff "in favor of Oliver." It was from this judgment that an appeal was instituted.

HOLT, for Appellant: The judgment appealed from, it is respectfully urged by the Appellant, is open to very grave

objections and should be reversed. It will not be denied that a Defendant whose property is in the hands of a *gardien à gages* has the right of offering, at any time, a good and solvent *gardien volontaire*, and that the seizing officer is bound to accept of such substitute. Such right of the *saisi* is not limited, in its exercise, to the period antecedent to the return of the writ, and, if the change be made subsequently to the return, it must necessarily appear otherwise than by the procès-verbal of seizure. The sheriff does not return to the Court, in any cause, that he has appointed any *gardien*, but, being commanded by the writ "safely to hold, keep and detain" (the effects seized) "in his charge and custody, until the attach-"ment thereof shall be determined in due course of law," he returns; "and the said ship so attached I now safely hold, "keep and detain in my charge and custody." The sheriff "holds and keeps" through the *gardien*, whom the law compels him to take, but, when by negligence, fraud or other misconduct on the part of the *gardien*, the property seized is made away with, or rendered useless to the creditor, the law looks to the wrong-doer, and not to the public officer who has been deceived. It is then, and then only, Appellant submits, that the law distinguishes between the sheriff and the *gardien*, and that it becomes necessary for the Court, whence the process has issued, to enquire: Who was the person that assumed the actual and personal charge of the effects seized? The Plaintiff in the Court below had nothing whatever to do either with the appointment of the original *gardien* (*à gages*) or with the substitution of Respondent as *gardien volontaire*, nor were Plaintiff, or his attorneys, in any manner parties to the presenting or filing of the document certifying the change of guardianship. The procès-verbal which mentions the appointment of the original *gardien*, is signed, not by the sheriff, but by the same two officers who have signed the certificate adverted to. The appointment and the substitution were equally the acts of the sheriff, for, in his return (signed by himself) to the writ of *venditioni exponas*, he states that he had demanded possession of the ship "from the guardian, "Thomas Hamilton Oliver, of Quebec, merchant, duly *appointed by me* as such guardian, &c." As the signature of Respondent is to be seen attached to the original *procès-verbal* of seizure, the presumption is that he accompanied the seizing bailiff to the office of the prothonotary of the Court below, and that the certificate of his substitution as *gardien* was filed in his presence. But, be that as it may, upon what ground does Respondent expect to be listened to, urging the objection that he was not "duly" appointed? There are documents before the Court shewing that he assumed and took

charge of the property seized. Whether the sheriff should, or should not, have asked leave of the Court to file the certificate objected to, was a matter which concerned the Court, or the Defendant, but not him, the *gardien*. But, admitting some irregularity to have existed in the manner of certifying to the Court the change of *gardien*, it disappeared the moment Respondent appeared before the Court in the capacity of *gardien*, and all argument upon it is rendered idle by the proceedings taken on the part of Respondent in shewing cause against the rule, and the door was closed upon any objections of that kind by the interlocutory order of Mr. Justice Taschereau, above referred to.

ALLEYN, R. for Respondent: The return to a *procès-verbal* may be looked upon as forming part of the return. The *procès-verbal* in the present case does not establish that Respondent was constituted *gardien*, but, on the contrary, that two other persons therein named were appointed guardians. Unless Appellant can show that there is a return of the sheriff to the effect that he the sheriff appointed Respondent guardian, or that the Court appointed Respondent guardian, Appellant must fail in his proceedings against Respondent. The Appellant relies upon a paper attached to the writ of *saisie-arrêt* as establishing a substitution of guardians. The sheriff's return bears date the twenty-fourth of October, 1857, and does not allude to this paper, which is dated the fifth day of November, 1857, several days after the sheriff had divested himself of the writ, and after the Court had been seized of his return. The record should account in some way for the appearance of that paper. Yet, it is quite silent, not a word is to be found in the record of the proceedings to shew that that paper was ever legally placed on record. But, if this paper is regarded, the Court must determine its value. To whom was the writ directed? The sheriff. Can any one but the sheriff, or his lawfully appointed deputy, execute a writ so directed? Could a bailiff of the Superior Court execute such a writ? Undoubtedly not. The return of a bailiff, unless acting within the special compass of his duty, is valueless and certifies nothing.

MEREDITH, Justice: This case comes before us upon an appeal from a judgment of the Superior Court, discharging a rule taken against Respondent, a guardian. The facts are as follows: The Plaintiff in the Court below, now Appellant, impleaded Edward Oliver in action for debt, and in order to secure the payment of the amount due to him, Plaintiff sued out a writ of *saisie-arrêt* before judgment, under which a ship called the *Melbourne*, of 1200 tons, and worth about £6000 currency, was seized. The writ was returnable on the

26th of October, 1857, and, on the 24th day of the same month, the sheriff made his return that he "had attached in "the hands of Edward Oliver, (the Defendant) a certain ship "or vessel called the *Melbourne*, as mentioned in the *procès* "*verbal* of seizure hereto annexed;" and in the *procès verbal* annexed to the writ, Jean Richard, the bailiff who executed the writ, declared "j'ai constitué pour gardien des dits effets "saisis, la personne de François Langlois, de Québec, calfat, "et Jean Lachance, de Québec, charpentier." By the final judgment in the said cause, Defendant was condemned to pay to the Plaintiff £704.9, 7 currency, with interest and costs; and Plaintiff having, in the usual course of law, sued out a writ of *venditioni exponas*, the sheriff made a return as follows: "In obedience to this writ I proceeded to demand possession "of a certain ship called *Melbourne*, seized under a previous "writ of *arrêt-simple* in this cause, from the guardian, Thomas "Hamilton Oliver, of Quebec, merchant, duly appointed by "me as such guardian to the above seizure, under the said "writ of *arrêt-simple*, which said Thomas Hamilton Oliver "neglected and refused to deliver over to me the said ship "*Melbourne*, whereby I was unable to effect a sale thereof, "as I am commanded by this writ." In the foregoing return, the sheriff speaks of Respondent, *as the guardian duly appointed by him*, the sheriff; but it is nevertheless true, that by the *procès verbal* of seizure annexed to the first return of the sheriff, it appeared, as already mentioned, that François Langlois and Jean Lachance were the guardians who had been named in this cause; and it is also true that the sheriff had not previously to the suing out of the writ of *venditioni exponas*, made any return to the court, to the effect that Respondent had been named as guardian in the place of Langlois and Lachance. We find however a *procès verbal*, in the record, signed by Jean Richard, the officer who executed the writ of attachment, in which that officer says: "En vertu de l'ordre "de William Smith Sewell, shérif du district de Québec, nous "avons déchargé de la garde du bâtiment *Melbourne*, saisi en "cette cause, les personnes de François Langlois et Jean Lachance, gardiens à gages, et avons constitué en leur lieu et "place, la personne de Thomas Hamilton Oliver, de Québec, "marchand, en qualité de gardien volontaire, (c'est-à-dire sans "gages) lequel s'en est chargé, et a même répondu par corps de "les garder et de les livrer toutefois et quand il en sera requis "par moi, huissier, soussigné, et a le dit gardien signé avec "nous, lecture faite." This *procès verbal*, which purports to be signed by the bailiff, his *recors*, and Respondent, bears date ten days after the writ was returnable, and twelve days after it had been actually returned into court; and although it

has been returned to us, as one of the papers of the record, it is not marked as having been filed, or endorsed in any way; and it does not appear when, how, or by what authority, it was placed on the record. After the sheriff had made his return to the writ of *venditioni exponas*, as already mentioned, Plaintiff obtained a rule for *contrainte par corps* against Respondent as guardian. He appeared by Counsel, but did not make any answer in writing; and Appellant having submitted the case for judgment against the guardian, without any other evidence of his appointment than the documents already spoken of, the rule was discharged; the reasons assigned in support of the judgment, so rendered, being as follows: " Considering that the sheriff, by his return to the writ " of *arrêt simple*, returns that he named two guardians other " than Thomas Hamilton Oliver, and that, after the return " of the writ, with his return thereto, the sheriff was *functus* " *officio* in relation thereto, and had no authority over the " seizure already made by him. Considering, moreover, that " the certificate of the bailiff, attached to the said writ and " return, and dated after the return of the writ into this " court, cannot be looked to and is without legal effect. Con- " sidering that there is no legal evidence of Oliver having " been named guardian in this cause by any person having a " right to name him, doth dismiss Plaintiff's motion for *con-* " *trainte de corps*, and the rule thereupon obtained, with costs " against Plaintiff in favor of Oliver." It is from the judgment thus rendered that the present appeal has been instituted; but, although that judgment is very different from the one to which Appellant would, it seems, have been entitled, had the proceedings been regular, I nevertheless do not think that it is wrong; because, (irrespective of any question as to the regularity or irregularity of the appointment of Respondent, or as to the regularity of the production of the *procès verbal* purporting to contain his appointment) I do not see that there is legal proof of the appointment of Respondent as guardian. It is no part of the official duty of a sheriff's bailiff to make a return to this court, as to what he does under a warrant from the sheriff. Richard's *procès verbal* is, in effet, such a return; and it being no part of his official duty to make such a return, we cannot regard it as authentic. But it may be said we have the sheriff's return to the writ of *venditioni exponas*. The objection to this part of the proof of Appellant is, that the sheriff cannot, in his return to a writ of *venditioni exponas* issued in 1860, embody a return of his prooceedings, under and by virtue of a writ of *saisie-arrêt* issued in 1857. Moreover, the certificate of the sheriff is not the best evidence of the appointment of a guar-

dian. The best evidence of such an appointment is the *procès-verbal* by which it was made ; and the *proces-verbal* itself ought to be certified to the court by the officer to whom the writ was addressed. In the present case, we have before us a paper that purports to be the *procés-verbal* under which Respondent was appointed ; but that document has not been produced before us, and certified to us, by the officer who had power to do so, namely, the sheriff. The Appellant contends that Respondent has been deprived of any right to make the objection to which I have alluded by the manner in which he appeared in the court below, and by the order of M. Justice TASCHEREAU directing the parties to proceed to evidence as to the value of the ship seized. I do not, however, think, that Respondent can be held to have made any admission, or to have waived any right, by any of his proceedings in the court below ; and I think it plain that the order of Mr. Justice TASCHEREAU, directing the parties to proceed to evidence, as to the value of the vessel seized, could not relieve the Appellant from the necessity of establishing, by legal evidence, the fact of the appointment of Respondent as guardian. I therefore concur in confirming the judgment of the court below, because I do not think it has been legally proved, that Respondent was appointed gardian, and, as such, obtained possession of the ship seized ; but if that fact were legally proved even if there were an irregularity in the appointment, I would not allow the person appointed, and who therefore voluntarily placed himself in the position of an officer of the court, to dispose, as he might think fit, of the property coming into his possession by reason of such appointment, merely in consequence of an irregularity on the part of an officer of the court, in which the Respondent himself concurred, and in order to avoid difficulty hereafter, I think we ought expressly to reserve to Plaintiff his recourse.

" The court, considering that it is not established, by legal evidence, that Respondent was appointed guardian in this cause, and, therefore, that, in the judgment of the court below, in so far as it dismisses the motion of Appellant for *contrainte par corps*, and the rule thereupon obtained, with costs in favor of Respondent, there is no error ; doth, in consequence, confirm the judgment rendered by the Superior Court at Quebec, on the thirty-first day of December, 1861, with costs in this court, in favour of Respondent, and against Appellant, the court reserving to Appellant any recourse he may by law be entitled to against Respondent, by reason of the matters and things in the said motion and rule alleged, &c." (14 *D. T. B. C.*, p. 296.)

HOLT and IRVINE, for Appellant.

ALLEYN, R. for Respondent.

PRESCRIPTION PAR UN TIERS-ACQUEREUR.

SUPERIOR COURT, Bedford, 13 octobre 1863.

Before MCCORD, Justice.

RUITER, Plaintiff, *vs.* THIBAUDEAU, Defendant, *and* TORRANCE, Opposant.

Jugé: Que sur contestation par le Demandeur d'une opposition par laquelle l'Opposant réclamait la terre saisie dans la cause, comme propriétaire, le Demandeur n'a pas droit d'invoquer la possession du Défendeur, afin de compléter la possession et prescription de dix ans, en vertu de l'article 115 de la Coutume de Paris.

This was an opposition filed by Andrew Torrance, claiming it to be the owner of the land seized in the cause, by virtue of a deed of sale from the sheriff of the district of Montreal, to his father Thomas Torrance, bearing date on the 2nd December, 1819, the opposant setting up title under the last wills and testaments of his father and mother. The Plaintiff contested this opposition, and alleged, in effect, that at the time of the seizure of the land, on the 30th June, 1862, Defendant, in whose possession it was seized, had, as well by himself as by his *auteur*, Plaintiff, enjoyed and possessed the land *à juste titre et de bonne foi, publiquement et sans inquiétation*, for upwards of ten years immediately preceding the date of the seizure, Opposant being present, of full age, and not privileged whereby Defendant had acquired a title to the land by prescription; that, on the 3rd July, 1848, by deed of sale before notaries, Hermanus Ruiter sold the land in question to Plaintiff, who possessed it from thence as proprietor, in good faith, freely, openly and publicly, without molestation or trouble, up to the 22nd of June, 1858, on which day, by deed of sale before notaries, Plaintiff sold the land to Defendant who thereupon took possession of the same; that the first mentioned deed from Hermanus Ruiter, to Plaintiff, was duly enregistered on the 11th of July, 1848, and the latter from Plaintiff to Defendant, was also enregistered. By his conclusions, Plaintiff invoked the benefit of the prescription of *dix ans, entre présents, etc.*, and prayed the dismissal of the opposition. The opposant filed an answer *au fonds en droit* to this contestation for the following amongst other reasons: 1st. because it did not appear by the contestation that Plaintiff possessed the land, *tant par lui-même que par ses prédécesseurs*, for a period of ten years; 2nd because it thereby appeared, on the contrary, that Plaintiff so possessed the said land only from the 3rd July, 1848, up to the 22nd June, 1858, when his possession ceased; 3rd because Plaintiff could not in law avail him-

self of the alleged possession of Defendant, but could only claim a possession of ten years by himself, or his *prédécesseurs*, not his successors and *ayant cause*. The Court maintained the answer in law and dismissed the contestation, with costs. (14 *D. T. B. C.*, p. 306.)

CORNELL and RACICOT, for Opposant.

O'HALLORAN and BAKER, for Plaintiff contesting.

SUBSTITUTION FIDEICOMMISSAIRE.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 10 mars 1857.

Before : Sir L. H. LAFONTAINE, BART., Chief-Justice, AYLWIN DUVAL and CARON, Justices.

CASTONGUAY, Appellant, *and* CASTONGUAY, Respondent.

Jugé : 1° Que, dans l'espèce, la donation au Demandeur contenait une substitution *fidéicommissaire*.

2° Que le tuteur à une substitution, poursuivi en cette capacité, représente tous les appelés à la substitution dans le cas où tels appelés ne sont pas mentionnés nommément dans l'acte contenant la substitution.

3° Que la clause dans la donation permettant l'aliénation des fonds, à constitution de rente, dans le cas où il serait, sur expertise, trouvé avantageux aux enfants du donataire, sera mise à exécution par la cour sur rapport d'experts, dans une action par le donataire concluant à être autorisé à vendre, quoiqu'il n'eût aucun enfant, et qu'il ne fût pas probable qu'il en aurait.

This was an action brought by a donee, under a deed of donation to him, of the 14th May, 1827, from his mother, and was directed against a tutor to the substitution to be allowed to sell, *à constitution de rente*, part of a large piece of land lying within the city of Montreal, described in the donation. The pleas of Defendant were to the effect : 1° That the *appelés* to the substitution should have been brought into the cause, and that the tutor to the substitution could not legally represent individuals of full age, but only children unborn ; 2° that there was no allegation that Plaintiff had any children, but that, on the contrary, it was admitted he had none, and that, therefore, he could not be justified in demanding that *experts* should be named to report whether it was, or was not, advantageous to such children to be allowed to sell the property in question. The case was inscribed for hearing *en droit* on the exceptions, and, on the 28th November, 1845, the exceptions were dismissed, and the action held to be regularly brought, all the *appelés* being held to be represented by the tutor to the substitution. The case having been heard on the merits, the court below rendered judgment on the 29th January, 1846. (VALLIÈRES, Chief Justice, ROLLAND, GALE and DAY, Justices.)

" Considering that Plaintiff has proved his right of action," " ordered that *experts* be named to visit the premises and report " whether it would be advantageous to the children of Plain- " tiff, or to those who might afterwards be *appelés à recueillir* " *ta substitution*, to sell *à constitution de rente.*" The following extracts from the donation had given rise to the question as to whether there was, in fact, a substitution, a point upon which some doubt was expressed in the court below, and upon which the opinion given by M. Justice ROLLAND principally referred. " Et la dite dame donatrice désirant conserver aux enfants à " naître en légitime mariage du dit donataire, seulement, la " propriété pleine et entière des biens ci-dessus désignés, sans " l'étendre à un degré plus éloigné, veut et entend que les " biens ci-dessus donnés en jouissance au dit donataire, " demeurent substitués, comme elle les substitue par ces pré- " sentes, aux dits enfants à naître en légitime mariage du dit " donataire, seulement, auquel elle donne la propriété des " dits biens, ce qui a été accepté pour eux par le dit donataire, " leur père, voulant et entendant que ceux qui sont appelés à " la présente substitution soient saisis des biens ainsi substitués, " aussitôt que le cas de la substitution sera avenu, sans qu'ils " soient obligés d'en faire demande en justice ; et dans le cas " de mort du dit donataire sans enfant, la jouissance et l'usu- " fruit des biens à lui présentement donnés seront reversibles " à ses frères et sœurs, ou à aucun d'eux, pour par eux en " jouir leur vie durante ; et, si au décès du dit donataire sans " enfants, tous ses frères et sœurs étaient décédés, la propriété " des dits biens retournera et appartiendra à leurs enfants nés " et à naître, pour être partagés entr'eux par souches. La " présente donation et substitution est ainsi faite, par la dite " dame donatrice, parce que tel est son bon plaisir, et sa volonté ; " et pour conserver la propriété des dits biens aux enfants du " dit donataire, comme il est dit plus haut, et en outre à la " charge par le dit donataire de payer à la dite dame donatrice, " par chaque année sa vie durante, à compter de ce jour une " somme de vingt-cinq livres cours actuel, par forme de rente " et pension alimentaire, payable, &c. La présente donation " est encore faite aux charges, clauses et conditions ci-après " exprimées, savoir : que le dit donataire ne pourra transporter " à aucune personne étrangère la jouissance et usufruit des " dits biens pendant le temps de sa jouissance, mais qu'il sera " tenu d'en percevoir les fruits et revenus pour son propre " bénéfice et avantage, sans pouvoir les dits fruits et revenus " être saisis par aucun des créanciers du dit donataire ; que le " dit donataire pourra vendre, à constitution de rente seule- " ment, le tout ou partie du terrain complanté *d'arbres frui-*

" *tiers* désigné en ces présentes, si par experts et gens à ce " connaissants cela est jugé avantageux pour ses enfants, &c."

ROLLAND, Justice, on the hearing *en droit* said : La cause était inscrite sur les exceptions, la Cour ne peut que les débouter, donnant pour motifs que l'action est régulièrement intentée contre le tuteur à la substitution, et que la naissance d'enfants au Demandeur, n'est point un fait nécessaire pour la présente demande. (1) Il en eût été autrement si le substitué était désigné par son nom, car alors il aurait fallu l'appeler, et, s'il était mineur, lui faire élire un tuteur, mais dans le cas d'une substitution *fideicommissaire*, comme la présente, où la personne qui en profitera n'est pas connue, il faut un tuteur à la substitution. Rien n'empêche les intéressés d'intervenir, quoique n'ayant qu'un droit éventuel. Le Défendeur a été nommé tuteur à la substitution, en sorte qu'il n'est pas vrai de dire qu'il ne représente que des enfants à naître du Défendeur, comme il est allégué par erreur dans les défenses, (2)

ROLLAND, Justice, upon rendering final judgment : Cet acte ne peut contenir qu'une *substitution*, car pour qu'il y eût une donation de la propriété avec jouissance après la mort du Demandeur, supposé qu'il n'eût qu'un simple usufruit, il faudrait une acceptation, ce qui manque. L'on ne peut supposer que la donatrice voulait faire un acte qui ne pouvait avoir de suite, exprimant une volonté sans aucun but, ni efficacité, ce serait donc un usufruit avec rétention de la propriété. Mais référant aux termes de l'acte on les trouve clairs et précis. C'est le langage ordinaire des substitutions, et voici ce que dit Pothier : " La principale règle est qu'on doit rechercher ce qu'a " voulu l'auteur de la substitution, sans s'attacher aux termes." C'est en conséquence de cette règle qu'il a été jugé, par arrêt du 16 juin, 1719, rapporté au 7me Tome du Journal, et par Augeard, que les termes dont se servent les Notaires *ignorants* dans les substitutions, que celui qui en est grevé n'aura que l'usufruit des biens substitués, n'empêchent pas que le grevé ne dût être considéré comme propriétaire de ces biens, et que le terme d'usufruit employé dans le testament doit s'entendre, non d'un usufruit proprement dit, mais d'un droit de propriété qui, au moyen de la substitution, devait s'étendre et se résoudre en la personne du grevé à sa mort, et qui à cause du rapport avec l'usufruit qui s'éteint de même avait été appelé usufruit. Thévenot, *Des Substitutions*, Ch. 1 et 3, donnant les résultats de la définition de la substitution *fidéicommissaire* dans les paragraphes précédents, No. 18 dit : " Il en résulte " qu'il faut qu'il y ait deux donations, deux libéralités faites

(1) Thévenot, Ch. 88.

(2) 5 Pothier, p. 508 ; Arrêts d'Augeard, p. 339 ; Arrêt du 14 août, 1700.

" par l'auteur de la disposition ; l'une au profit de celui qui doit " rendre ; et l'autre au profit de celui à qui l'on doit rendre." " Au No. 19 : " Il s'en suit encore, que ces deux donations " doivent être *successives* ; le second donataire ne devant re- " cueillir qu'après le premier." Au No. 31 : " Finalement il en " résulte que celui qui est chargé de rendre n'a point en géné- " ral la liberté indéfinie d'aliéner, etc." Au Ch. XI. Termes par lesquels on peut substituer : No. 176 : 1° " Point de termes " marqués." No. 180 : 2° " Il faut des termes dispositifs, et " non simplement énonciatifs." No. 183 : 3° " Peu importe " que les termes soient impropres, s'il résulte suffisamment de la " disposition, qu'on a voulu substituer *fidéicommissairement*." No. 190 : 4o " Il faut que les termes emportent trait de temps." No. 199 : 5o " Il faut que les termes emportent l'ordre successif." No. 206 : 6o En explication. " Posons qu'il soit dit dans une " donation entre vifs, *je donne à un tel*, et à ses enfants à " naître cela formera-t-il un *fidéicommis* en faveur des en- " fants à naître ? Oui ; car le père était saisi par la donation, " et les enfants ne pouvant l'être, parce qu'ils n'existent pas, " il en résulte nécessairement l'ordre successif. No. 207 : La " propriété ne pouvant être en suspens, le père est le proprié- " taire de tout, à la charge de rendre à ses enfants s'il lui en " survient." No. 212 : 7o. Mots. " Je substitue, terme ordinaire, " et après sa mort *je substitue*." Dans le cas actuel, le langage de la donatrice ne laisse aucun doute quant à l'intention de créer une substitution et un ordre successif. Il y est dit : " Je donne à mon fils la jouissance, et, désirant conserver aux enfants à naître du dit donataire, seulement, la propriété pleine et entière du bien ci-dessus désigné, sans l'étendre à un degré plus éloigné, je veux et entends que les biens ci-dessus donnés en jouissance au dit donataire *demeurent substitués, comme je les substitue* par ces présentes, aux dits enfants à *naître*, auxquels je donne la propriété des dits biens, qui a été acceptée pour eux par le dit donataire, leur père, voulant et entendant que ceux qui sont appelés à la présente *substitution* soient saisis des biens ainsi substitués, aussitôt que le cas de la substitution sera avenu etc." Voilà bien, ce semble, le langage de la substitution *fidéi-commissaire*, V. 10 Ricard ; Domat, p. 199. Au No. 225, Thevenot observe que ce mot *je substitue* employé dans une donation entrevifs ne pouvait en général convenir qu'à la substitution *fidéicommissaire*, et il ajoute au No. suivant : " En effet, le premier gratifié étant " *saisi*, il est clair que la substitution ne peut alors trouver " prise." Il est évident que si la donation ne contenait pas une substitution, elle ne peut valoir comme donation de propriété aux enfants à naître, ni à d'autres qui ne sont pas parties acceptantes à l'acte. Ricard, Tr. des donations, p. 199.

S'ils étaient deux qui fussent premiers donataires, comme dans le cas où l'usufruit est donné à l'un, et à l'autre la propriété, et qui dussent prendre la chose donnée par ses mains, l'acceptation de l'un ne profiterait pas à l'autre, et la donation quoique faite par un même acte, serait valable au profit de celui qui aurait accepté, et nulle pour le regard de l'autre. L'on n'a pas prétendu ici que le Demandeur fût un simple usufruitier, si c'était le cas, et qu'il n'y eût pas de substitution, tout le bien à la mort de la mère donatrice pouvait bien retourner à la masse ; certes cela changerait bien la position des enfants, et les frères et sœurs du Demandeur n'ont guères compris leurs droits. Mais qu'est-ce qu'une donation entrevifs d'un usufruit à vie sans substitution ? L'on ne trouve cela nulle part, si c'est donation entrevifs la propriété a dû, ce semble, être donnée. Si elle n'a pas passé au donataire, quel effet aura la donation après le décès du donateur ? Or, évidemment, personne ne peut profiter de cette donation que la partie acceptante. Elle est caduque quant aux enfants à naître ou aux frères et sœurs du donataire, à moins d'une substitution en ordre successif. *La propriété ne peut pas être en suspens*, elle serait donc demeurée à la donatrice. Or que s'ensuit-il ? C'est que l'usufruit ne peut durer que le temps de sa vie. Car, aussitôt sa mort, la propriété passe à ses héritiers, et l'on ne peut pas, je crois, prétendre que la donation d'usufruit aurait un effet au-delà de son décès, puisqu'elle n'a pas les formalités du testament pour la validité des dispositions à cause de mort. Tout le monde sait qu'un bien substitué peut se vendre quelque fois pour des causes utiles, et généralement pour des causes nécessaires, lorsque celui qui a créé la substitution n'a pas déclaré quels seraient les cas où les immeubles pourraient s'aliéner. Mais quand le donateur a exprimé sa volonté, *il faut la suivre*, et je ne connais aucune différence entre les legs et les donations à cet égard. Les legs ne sont que des donations, et le donateur peut mettre toutes conditions à sa libéralité. La seule question serait de savoir, admettant qu'il y ait substitution, *si c'est ici le cas voulu par la mère du donateur ?* Nous avons déjà jugé la question par notre interlocutoire, et s'il ne s'agissait que de constater un fait, l'utilité de la vente, le rapport d'experts l'établit. La seule objection qui ait été faite par le Défendeur, est le défaut d'enfants, et l'improbabilité qu'il en naîtra. Mais comme cette objection n'est soutenue d'aucune autorité, nous en avons déjà disposé, et je ne vois aucune raison d'en dévier. Je crois apercevoir quelque chose de favorable dans cette demande. C'est l'intention présumée d'une mère que son fils eut une vraie jouissance de ses biens, cela pour sa subsistance, sa vie durante. Il est le premier gratifié. C'est lui que la donatrice

a préféré. C'est pourquoi prévoyant que ces biens (un verger en particulier) pourraient ne donner aucun revenu, elle a dû permettre l'aliénation. mais on dit qu'elle ne l'a voulu que pour *l'avantage de ses petits enfants.* Mais n'est-il donc pas de l'avantage des enfants de son fils, que leur père ne soit pas dans l'indigence, et qu'il puisse leur laisser une succession ? Si la jouissance des biens substitués ne lui profite pas, tandis qu'en les vendant ils produiraient des revenus considérables, sans que le fonds diminuât, (puisqu'il est question d'assurer les capitaux) le père ne pourra-t-il pas s'enrichir et les enfants profiter ? Il paraîtrait que le Demandeur n'a point d'enfants, l'on dit même qu'il est probable qu'il n'en aura jamais, et c'est dans l'intérêt des parents *collatéraux* que l'on voudrait que le fils de la donatrice n'ait qu'une jouissance *nominale sans profits*, afin que ce bien, qui est susceptible d'augmenter de valeur, (étant dans l'enceinte d'une ville) demeure aux soins du grevé, et qu'il le leur conserve sans en retirer lui-même aucun revenu. Telle n'était pas suivant moi l'intention de la mère donatrice. Pour résumer, je trouve qu'il y a *substitution*, et que le Demandeur est le grevé, chargé de rendre les biens à sa mort à ceux que sa mère lui a substitués. Je ne puis concevoir l'idée d'un usufruit simple, par donation entrevifs, sans aliénation de la propriété. Et les termes de l'acte, (ou le mot *usufruit* ne se trouve même pas) me semblent rencontrer tout ce que les auteurs ont dit de la manière dont on crée une substitution *fidéicommissaire.* Quant à l'objection tirée de ce qu'on ne doit aliéner les biens substitués que dans certains cas voulue par la loi, cela n'a aucune application au cas actuel. Il est une autre règle, Thévenot, C. 48, p 255, No. 787, se fait cette question. Est-« il de l'essence de la substitution *fidéicommissaire*, que le « grevé n'ait pas liberté indéfinie d'aliener ? » Et il répond : « Non, le substituant peut permettre l'aliénation *indéfinie.* « Une substitution qui contiendrait cette clause serait valable. » Voy. Rep. vbo. Substitution, sect. IX, p. 495. « La volonté de celui qui dispose est la loi suprême dans les *fidéicommis,* » C'est aller plus loin qu'il ne faut, mais qui a jamais douté qu'un donateur, (par donation entrevifs) comme un testateur, peut donner ou permettre l'aliénation des biens en certains cas qu'il définit, surtout lorsqu'il assure les fonds ou capitaux aux substitués. Tous les jours nous agissons d'après cette idée, que le testateur ou donateur peut mettre à sa libéralité telles conditions qu'il lui plait. Et des légataires grevés ont été souvent autorisés à vendre suivant les directions du testateur ; ce n'est pas une doctrine nouvelle. Il ne s'agit donc que d'exécuter dans le cas actuel la volonté de la donatrice. Je n'ai rien entendu à ce sujet qui puisse me faire croire, que, par notre interlocutoire, nous avons donné une fausse interprétation à

la donation, et j'y persiste. Il n'est pas hors de propos de référer à une décision de cette Cour, en avril, 1844, sur la demande de Mad. Barron, pour mettre en vente des biens dont elle n'était que l'usufruitière. Là, en refusant d'acquiescer à cette demande, la Cour s'est expliquée, disant que le simple usufruitier ne pouvait pas se fonder sur la loi qui permet au grevé de vendre les biens substitués en certains cas, comme des immeubles qui dépérissent, des maisons caduques, et à la réparation et reconstruction desquelles les biens substitués ne peuvent fournir. (Rép., vbo. Subst., sec. XXXI, § 1, p. 527, 1 Col.) Le grevé comme propriétaire ayant droit de jouir d'un bien productif, tandis que l'usufruitier n'a que la jouissance du bien tel qu'il est, et aucun droit dans le fonds qui est inaliénable dans son intérêt, comme bien d'autrui. Et si je suis d'avis ici de permettre la vente, c'est parce que je considère le Demandeur propriétaire grevé de substitution, et que l'intérêt même du grevé est à considérer comme le premier gratifié, surtout si c'est un enfant de la donatrice. La donatrice a voulu qu'on consultât l'intérêt des substitués, *à la bonne heure.* Et je trouve que l'aliénation proposée est aussi dans leur intérêt. Je constate le fait de la manière que la donatrice l'a voulu par experts et gens à ce connaissants. Lacombe, Jurisp. Civile, vbo. Substitution, partie 2, sect. 4, No 5, p. 247 : En quel cas biens substitués peuvent être aliénés, et peuvent être hypothéqués. 2 Prudhon, *des Droits d'Usufruit*, No 516.

JUDGMENT IN APPEAL : Considering that, in the judgment appealed from, there is no error, the Court doth confirm the same, with costs. (14 *D. T. B. C.*, p. 308.)

GIARD, for Appellant.

CHERRIER, DORION and DORION, for Respondent.

CERTIORARI.

SUPERIOR COURT, Bedford, 23 octobre 1863.

Before : MCCORD, Justice.

Ex parte CHURCH, Petitioner.

Jugé : 1° Que le délai entre la signification d'une sommation émanée d'une Cour de juges de paix à trois heures de l'après-midi, et le rapport du writ le jour ensuivant à dix heures du matin, est insuffisant, et que, dans les circonstances de la cause, le Demandeur ne pouvait pas procéder légalement à jugement, *ex parte*, le jour du rapport, le Défendeur ne comparaissant pas.

2° Qu'un writ de *certiorari* sera accordé pour faire transmettre une conviction à la Cour Supérieure, nonobstant que le writ de *certiorari* soit prohibé par le statut en vertu duquel la conviction a eu lieu.

The collector of inland revenue (formerly styled revenue inspector) for the district of Bedford, prosecuted the present applicant, under the consol. stat. of Lower Canada, chap. 6, for selling liquor without license. The Defendant made default, and Plaintiff obtained, *ex parte*, a conviction for $50 and costs &c., on the 7th July, 1863, before three justices of the peace, at Granby, in the said district. The Defendant, on the 13th October, 1863, moved for a writ of *certiorari* to remove the conviction to the Superior Court, and, amongst other reasons set forth in his *affidavit* of circumstances, he alleged that the writ of summons and declaration in the said cause were served upon him at about three o'clock in the afternoon, the 6th day of July, then last, at his domicile, at a distance of about 20 miles from the place where he was by the writ ordered to appear on the following day, (7th July) at ten of the clock in the forenoon; that no sufficient and reasonable delay was thereby given him; that the justices of the peace had no right to, and could not proceed *instanter*, and in his absence, and that the said conviction so rendered by them was illegal and unjust. In support of his pretensions, applicant filed copies of the record of proceedings before the magistrates, including copy of the bailiff's return, and a certificate of Defendant's default, whereby it appeared that the above facts were correctly stated in the affidavit. The statute in question made no provision as to the delay to be granted in such cases between the service and return of the writ. Writ granted on the ground that no reasonable delay to appear was given to Defendant. (14 *D. T. B. C.*, p. 318.)

CORNELL and RACICOT, for Petitioner.

HUNTINGTON and LAY, for Cowie.

VENTE.—CRAINTE DE TROUBLE.

SUPERIOR COURT, Bedford, 23rd October, 1863.

Before MCCORD, Justice.

HASE *et al.*, Plaintiffs, *vs.* MESSIER, Defendant.

L'acquéreur d'une pièce de terre, poursuivi pour la balance du prix de vente, allégua et prouva que la terre avait été originairement concédée par lettres patentes à A. B. et autres, et subséquemment vendue au Demandeur sans garantie, excepté quant à ses faits et promesses, par un individu qui n'avait pu établir aucune connexité par titres entre lui et les concessionnaires originaires, ou entre aucunes autres personnes :

Jugé : Qu'un acquéreur ainsi poursuivi n'a pas droit d'obtenir du Demandeur le cautionnement pourvu par la 23 Vict., ch. 59, sec. 18. (1)

(1) V. art. 1535 C. C.

The Plaintiffs alleged, in their declaration, that, on the 17th October, 1861, by deed of sale before notaries, they sold the piece of land in dispute to Defendant, for the sum of $900, of which they had received $150, and concluded against Defendant for the instalments due at the date of their action, to wit, $289. The Defendant pleaded, in effect, that, by the deed of sale Plaintiffs had sold the piece of land to him with promise of warranty against all troubles, evictions, alienations, and other hindrances generally, whatsoever; that Defendant had ascertained, since the date of the deed, that the land was, on the 27th March, 1827, granted by the Crown to Catherine Sax, and others, and produced a certificate of the letters patent signed by the deputy registrar of the province; that, long afterwards, to wit, on the 16th May, 1860, the land in question was, by deed before notaries, sold to one James Hase, by one Ebenezer Martin, without stating in the deed from whom he derived any title to the said land, but, on the contrary, stating that he sold it with *guarantee, except as to his own acts and deeds only*; that, by virtue of the premises, Defendant feared that Plaintiffs were not, at the date of their deed of sale to Defendant, the lawful owners of the land, and had just cause to fear that he, Defendant, would be troubled by petitory actions on the part of the owners. Conclusions, that Plaintiffs, before being able to execute their judgment, be ordered to give Defendant good and sufficient security that he should not be troubled by any claim of title to the lot. In support of his pretensions, Defendant produced the certificate of letters patent, an authentic copy of the deed of sale from Martin to James Hase, and Plaintiffs' admission as to the identity of the piece of land granted by letters patent, and, subsequently, sold by Martin to James Hase, and afterwards by Plaintiffs to Defendant: It was contended, on behalf of Defendant, that he was entitled to the security referred to in the 23rd Vic., cap. 59, sec. 18, which is in the following terms: "If the purchaser of any real property is troubled or has just "cause to fear that he will be troubled by any hypothecary "or revendicatory action, he shall be entitled to delay the "payment of the purchase money until the vendor has removed such trouble, unless the vendor prefers to give security...."

Racicot, for Defendant, contended that Defendant could not ascertain, and Plaintiffs refused to shew, how and by virtue of what titles they were in the rights of the original grantees; that this refusal or neglect of Plaintiffs to exhibit their deeds, if they had any, and the absence of such deeds formed *primâ facie* evidence that, at the date of the deed to Defendant, they were not the lawful owners of the land; that a

suspicion was also created by the form of the clause as to the warranty above referred to, and that Defendant, therefore, had just reason to fear that he would be troubled by revendicatory actions as mentioned in the statute. That if Plaintiffs, at the time of the sale, were the true owners of the land, there was no hardship in their being ordered to give the required security, in default of their shewing by what chain of titles they had acquired the land. That, under the circumstances, Defendant was justified in claiming the security provided by the statute above cited, and that if sued by the original grantees or persons claiming under them, Defendant would have no means of shewing title in his vendors.

O'HALLORAN, for Plaintiffs, argued that Plaintiffs were not bound to shew to their purchaser, Defendant, the whole chain of titles from the original patentees, and that the present case did not come under the provisions of the statute referred to; that Defendant, in order to establish "the trouble or just cause to fear trouble," contemplated by that law, should have either shewn an actual revendicatory action instituted against him, or at least a threat or notice on the part of some third party to institute such an action; that, if Defendant had been desirous of examining Plaintiffs' titles, he should have done so before signing the deed given to him. The Court gave judgment for Plaintiffs, without ordering security to be given. (14 *D. T. B. C.*, p. 320.)

O'HALLORAN and BAKER, for Plaintiffs.

CORNELL and RACICOT, for Defendants.

COUR DE CIRCUIT.—COMPETENCE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 7 December, 1863.

Before: SIR LOUIS H. LAFONTAINE, Bart., Chief-Justice, MEREDITH, MONDELET and BADGLEY, Justices.

SMITH *et ux.*, Appellants, *and* PATTON, Respondent.

Jugé: Que la Cour de Circuit n'a pas juridiction dans une action pour aliments au montant de $200, par année, réclamés pour une période indéterminée, savoir, pendant la vie durante de la Demanderesse; et que le jugement de la Cour de Circuit accordant £28, par année, la vie durante de la Demanderesse, sera infirmé, et l'action de la Demanderesse renvoyée. (1)

The action was brought *in formâ pauperis*, by Plaintiff, an aged and infirm woman, against her son in law and his wife, the daughter of Plaintiff, for an alimentary allowance and

(1) V. art. 1054 C. P. C.

maintenance. By the conclusions of her declaration, Plaintiff prayed : "that Defendants be jointly and severally condemned to pay and satisfy to Plaintiff the sum of £50, each and every year, as and for a life rent, the same payable quarterly." The plea alleged, in effect, that Plaintiff had certain rights in real estate described in the plea, and that Defendants were willing to allow $60 to Plaintiff, per annum on obtaining a transfer of the rights in the real estate referred to. By judgment rendered on the 28th May 1863, (LAFONTAINE, J.) Defendant was condemned to pay Plaintiff "the sum of twenty eight pounds, each and every year, as and for a life rent during the " life time of Plaintiff, the whole with costs." From this judgment an appeal was instituted on the ground, first, of the excess of jurisdiction (1). Next, that the Defendants were condemned jointly and severally, whereas it was contended that if the daughter died, her husband ought not to be held personnally for the *rente*.

BURROUGHS contended that the appeal must be dismissed, because it was not certain, from the judgment, that Defendant would be liable for a sum exceeding £50, as she might die at any time ; and because, as the evidence in the Court below was not taken in writing, there could be no appeal ; and, because no plea to the jurisdiction had been filed.

JUDGMENT IN APPEAL : Seeing that the Circuit Court hath juridiction to take cognizance of and determine civil suits and actions wherein the sum of money or the value of the thing demanded does not exceed two hundred dollars ; seeing that the action and demand in this cause is for an annual life rent of two hundred dollars to be payable, during an undetermined period, namely, during the life-time of Plaintiff ; seeing that the said action and demand are and were in excess of the limited jurisdiction of the said Circuit Court, and that, in the rendering of the judgment, in this cause, by the said Circuit Court, there was error, doth set aside the said judgment ; and this Court, proceeding to render the judgment which should have been rendered by the said Circuit Court, doth dismiss the said action and demand of Plaintiff in the said Court, Respondent herein, for want of jurisdiction in the said Circuit Court, to take cognizance of the same, without costs." (14 *D. T. B. C.*, p. 323.)

FILION, for Appellants.

BURROUGHS. for Respondent.

(1) The Circuit Court shall have cognizance of, and shall hear, try and determine all civil suits or actions, wherein the sum of money or the value of the thing demanded does not exceed two hundred dollars.—Con. Stat. L. C. cap. 79, sec. 2.

LOUAGE.—RESPONSABILITE DU LOCATEUR.

COUR DE CIRCUIT, Québec, 25 février 1864.

Présent : Taschereau, Juge.

BOILY, Demandeur, *vs.* VEZINA, Défendeur.

Jugé : Que le propriétaire d'une maison, louée à plusieurs locataires, n'est pas responsable des dommages que l'un de ses locataires peut souffrir des actes ou voies de fait d'un autre des dits locataires. (1)

L'action était intentée par un locataire contre son propriétaire pour £15 de dommages, allégués avoir été soufferts par lui, et les membres de sa famille, en raison d'une grande quantité d'eau qui traversait continuellement le plancher de haut, et qui, tout en détériorant ses meubles, causait de graves maladies aux membres de sa famille, et ce, au su et connaissance du locateur. Pour soutenir cette action, le demandeur produisit son bail qui lui donnait " une partie du bas d'une maison," avec les conventions ordinairement stipulées dans cette espèce de contrat ; il produisit en outre un protêt notarié contre le Défendeur, et établit la valeur des dommages soufferts, au moyen de témoignages. Le Défendeur, par son plaidoyer, niait qu'il fût responsable envers le Demandeur sur aucun des faits allégués, prétendant que les inconvénients et dommages soufferts par le Demandeur étaient par le fait d'une personne habitant l'étage supérieur de la maison, et sur laquelle il n'avait aucun contrôle, et ne résultaient d'aucun vice dans la construction de la maison en question, laquelle était dans le meilleur ordre possible.

TASCHEREAU, Juge : Le Demandeur occupait, sous bail notarié, le bas de la maison du Défendeur, laquelle était en bon état de réparations, et le Défendeur s'était conformé à toutes les conditions requises par le bail. Le Demandeur savait au temps qu'il prit la maison, qu'il y avait d'autres locataires que lui, et les inconvénients que le Demandeur a prouvé avoir souffert provenaient de la négligence de l'un de ses locataires. La question qui se présente maintenant est une question de droit. " Le propriétaire d'une maison est-il responsable pour les actes de son locataire ?" Le Défendeur, par son bail, consenti en faveur du Demandeur, est tenu de faire jouir le Demandeur, ceci renferme l'obligation de le mettre en possession, de le garantir et de le défendre contre toute voie de droit. Je crois que le fait dont le Demandeur se plaint est une voie de fait pour laquelle le Défendeur n'est pas responsable ; c'est sans son consentement ou connaissance qu'elle a eu lieu,

1) V. art. 1616 C. C.

et il ne devrait pas en souffrir les conséquences. Je serais disposé d'assimiler cette question à celle d'un voisin ou co-locataire. qui souffre des dommages par un incendie causé par la négligence ou faute de son voisin ou locataire. Les autorités citées, lors de l'argument, sont assez formelles sur ce sujet: 11 Toullier, No. 171 : " Celui d'entre les locataires qui est pré-" sumé seul en faute, parce que les autres ont prouvé qu'ils " n'y sont pas, est tenu des dommages et intérêts, non seule-" ment envers le propriétaire, mais encore envers les autres " locataires qui ont souffert du dommage par l'incendie de " leurs meubles arrivé par sa faute." Et à la note 2, Pothier, *Louage*, No. 81 : " Il y a différentes espèces de troubles " qui peuvent être apportés de la part des tiers à la jouissance " du conducteur ; il y en a qui ne consistent que dans des " voies de faits, sans que ceux qui ont apporté le trouble pré-" tendent avoir aucun droit dans l'héritage, ou par rapport à " l'héritage. Par exemple, si des laboureurs voisins font paître " leurs troupeaux dans les prairies d'une métairie que je tiens " à ferme, et ce, par voie de fait, sans prétendre en avoir le " droit ; si des voleurs, au clair de la lune, endommagent mes " vignes, etc., le locateur n'est pas garant de cette espèce de " trouble, le fermier n'a d'action que contre ceux qui l'ont " causé, *actionem injuriarum*, et si cette action lui est inu-" tile, soit parce qu'on ne connaît pas ceux qui lui ont causé le " tort, soit par leur insolvabilité, et qu'il ait, par ce moyen été " privé de tous les fruits qu'il avait à recueillir ou de la plus " grande partie, le fermier peut seulement en ce cas demander " la remise de la ferme, pour le tout ou pour partie," etc., Par cet article l'on voit que si le locataire avait aucun droit contre son locateur pour avoir été privé de la jouissance de la maison louée, il aurait contre son locateur, non pas une action en dommage (*actionem injuriarum*) comme il a jugé à propos de prendre, mais bien une action en demande de remise de loyer, et cette dernière seulement dans le cas où celui qui a apporté le trouble serait inconnu, ou que par son insolvabilité ou autres raisons il ne pourrait faire valoir ses droits contre celui-ci. Le même principe est établi au No. 287 du même traité de Pothier où il est dit que, " si un étranger " qui a apporté du trouble à la jouissance du locataire ou fer-" mier, prétendant avoir la possession de la pièce de terre " dans la jouissance de laquelle il a troublé le premier ou y " avoir quelque droit de servitude, ce fermier n'étant pas pos-" sesseur, ne pourra pas lui former complainte : il n'aura en " ce cas que l'action personnelle contre son locateur pour qu'il " soit tenu de le faire jouir sans trouble, etc. Si l'étranger qui " a apporté du trouble ne prétend avoir ni la possession, ni " aucun droit dans l'héritage, le fermier a de son chef action

" contre lui, *actionem injuriarum*, aux fins de défenses et de " dommages et intérêts, s'il a souffert quelque préjudice." Pour ces raisons, et, d'après les autrorités que je viens de citer je suis d'opinion que l'action devrait être renvoyée. Jugement : Action renvoyée, avec dépens. (14 *B. T. B. C.*, p. 325.)

RHÉAUME, pour le Demandeur.

JOLICŒUR, pour le Défendeur.

CHEQUE.—CODICILLE.

IN THE QUEEN'S BENCH, Montreal, 1st March, 1864.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, J., BADGLEY, J.

EDEN COLVILLE *et al.*, *ès qualité*, Defendants in the court below, Appellants, *and* THE REVEREND JOHN FLANAGAN, Plaintiff in the court below, Respondent.

Held : 1. That a written will, duly executed before three witnesses, may be altered, in its bequests, by cheques signed by the testator during his last illness, and left, " as parting gifts," for the parties indicated in them, in the hands of his private secretary.

2. That probate of a written memorandum of such bequests made by the testator's private secretary, at his request, as his " last bequets," will suffice to entitle the legatees to recover, without obtaining probate of the cheques themselves.

3. That the testator in this particular case was *compos mentis.*

The judgment appealed from was rendered in the Superior Court, Montreal, on the 26th September, 1862, (MONK, Justice,) and condemned Appellants, as executors of the last will of Sir George Simpson, governor in chief of the Hudson Bay Company's territories, to pay to Respondent the sum of $1000, claimed to have been given or bequeathed to him by Sir George Simpson. The declaration consisted of four counts containing allegations to the following effect. First count : " That, hereto- " fore, to wit, on the 4th day of September, 1860, at Lachine, " Sir George Simpson declared it to be his desire to give and " bestow to and upon Plaintiff the sum of $1000 ; and, then " and there, in pursuance of his expressed desire and intention, " he drew and signed his check in writing, bearing date at " Lachine, the fourth of September, 1860, upon the Bank of " Montreal, (to wit, at Montreal) whereby he directed the " cashier of the bank to pay the Reverend John Flanagan, " or order, (to wit, Plaintiff or his order) one thousand dollars, " and then and there, by manual delivery, *donation manuelle*, " handed and delivered the check to Edwards M. Hopkins, of " Lachine, entrusting to him the check for delivery to Plaintiff, " Hopkins, then and there, acting for and representing Plain- " tiff, and who accepted the same on behalf of Plaintiff, and

" hath since delivered the same to Plaintiff, which check is " herewith filed to form part hereof. That the check was " duly presented and payment refused, and was duly protested. " That the amount of check was, before the death of Sir George " Simpson, and or about the date of said check, entered in the " private account books of Sir George Simpson, as having been " paid to Plaintiff, and was charged to and taken out of the " estate of Sir George Simpson, before his death; and that, " moreover, the said sum was not, and, is not, included in the " inventory of the estate and succession of Sir George Simpson, " taken upon the fourth day of December, 1860, and which " inventory, specifying the cash balance of Sir George Simpson, " at the time of his death, the amount of the check being " deducted, hath not hitherto been questioned by Defendants." The death of Sir George Simpson, 7th September, 1860, leaving Defendants as executors, and that the amount " so granted and given" was due and owing to Plaintiff. The second count reiterates the allegations as to the *don manuel*, and then alleges: " That, on the 6th September, 1860, at Lachine, Sir " George Simpson being still of sound memory and under- " standing, and being desirous of ratifying and confirming the " said gifts, and more especially, the gift to Plaintiff, requested " Hopkins to write down the names of those to whom he had " made the said gifts as aforesaid, and in whose favor he had " drawn the checks as aforesaid, and the amount of each said " checks," and that the same were so written down by Hopkins, who " immediately, in the presence of numerous witnesses, " read over the same to Sir George Simpson, who, then and " there, confirmed and reiterated each gift, and declared the " same to be in accordance with his last wishes. (1) The allega- " tions as to the presentment and protest of check, the death

(1) Memoranda at the request of Sir George Simpson, on the 6th September, 1860:

Angus Cameron	$5000	For each of these amounts I was instructed to draw checks on the 5th September, which were signed by Sir George Simpson in the presence of myself and James Murray.
Hector M'Kenzie	5000	
E. M. Hopkins	5000	
Rev. J. Flanagan	1000	
Rev. W. Simpson	1000	
James Murray	1200	

The above was written and read over by me, and approved by Sir George Simpson in the presence of all his family. (Signed) EDWD. M. HOPKINS.

The above memoranda were taken in the presence of the undersigned, at the request of Sir George Simpson. Lachine, 6th September, 1860. (Signed) A. CAMERON. JAMES MURRAY. FRANCES WEBSTER CAMERON. MARGARET MCKENZIE SIMPSON.

[Copy of Check.] "BANK OF MONTREAL, Lachine, 4th September, 1860. Pay to the Rev. John Flanagan one thousand dollars. (Signed) G. Simpson." To the Cashier.

of Sir George Simpson, and the quality of Defendants, are also repeated in this count. The third count set up: "That "on the 10th March, 1860, Sir George Simpson made his last "will in writing before witnesses, of which probate was duly "granted on the 6th November, 1860. That, on the fourth "day of September, 1860, Sir George Simpson, being then ill "of body and in the near prospect of death, but of sound and "disposing mind, memory and understanding, declared it to "be his desire, *to give and bequeath* to certain persons, his "friends, whom he, then and there, named, certain other sums "of money by him specified, and among others, to Plaintiff, "the sum of $1,000; and, then and there, in pursuance of his "expressed desire and intention, he drew and signed his cer- "tain other check in writing, bearing date, &c. That, on the "6th September, 1860, Sir George Simpson, being then ill of "his last illness, at his usual residence, in the village of La- "chine, and being desirous of making *certain bequests to his* "*friends*, and, amongst others, to Plaintiff, in accordance to "his previous intention," requested Hopkins to write down "the said bequests. That the memorandum of the said be- "quests was then and there in the presence of more than "three witnesses, and some of them were then and there "called upon, by Sir George Simpson, to attest the same, and "bear witness, that such was his last will, and words to that "effect, read over by Hopkins to Sir George Simpson, who "approved and confirmed each item and bequest, separately, "and declared the same to be in accordance with his last will, "and to be his last will. That the substance of the testimony "of the witnesses attesting the speaking, declaring and pu- "blishing of such testamentary words was put into writing, "within six days from the speaking, declaring and publish- "ing of such words, and that proof of the speaking, declaring "and publishing thereof hath been duly made, and probate "of such bequest, and of the memorandum of the same, hath "been granted by the honorable JAMES SMITH, J. S. C., upon "the eleventh day of October instant. That, at the time of "making the said bequests, Sir George Simpson was in full "possession of his mental faculties and of sound and dispo- "sing mind, memory and understanding. That Plaintiff is the "Reverend J. Flanagan, mentioned in the said memorandum "of bequests, hereinbefore recited." The fourth count set up the bequest of the 6th September, 1860, as having been made as *a codicil in writing* to the last will of the testator, of the 10th March, 1860, and that probate of such codicil, was duly granted. The Defendants, by their plea, admitted the making of the will of the 10th March, 1860, but denied that the will had been revoked or altered in any way; and alleged that

Defendants were ignorant as to the making of the check in question, which is moreover alleged to have been made without any value or consideration given, adding: " That, on the " 4th September, 1860, Sir George was labouring under " disease of the brain, with which he had been some time pre- " viously attacked, and of which he died on the 7th Septem- " ber, 1860. That sir George Simpson was not, on the 4th " September, 1860, of sound and disposing mind, memory and " understanding, as is pretended and alleged in the declara- " tion, but, on the contrary, was throughout the whole day, " and, for some time previously had been, and from that day " until his decease continued to be, of unsound mind, memory " and understanding, and wholly incapable in law of contract- " ing or disposing by last will and testament or otherwise." The plea also contained a general denial of all the allegations in the delaration not expressly admitted by the plea. The parties proceeded to proof and the judgment rendered in the Superior Court was in the following terms: " The Court, considering that it is not alleged, pretended, or proved by Defendants that there was any fraud or suggestion practised in regard to the gift or donation mentioned and set forth in the Plaintiff's declaration, or any improper influence whatever exercised over the mind of Sir George Simpson relative to the said gift or donation, the amount whereof is sought to be recovered by the present action; and considering that Defendants have not proved, by legal and conclusive evidence, that Sir George Simpson, at the time of making and signing the order or check by Plaintiff produced and filed, and at the time of making the gift or donation set forth in Plaintiff's declaration, was of unsound mind and incapable in law of making such gift or donation; considering, on the contrary, that Plaintiff hath established, by legal and sufficient testimony, that, at the time and times of making and signing such order or check, and of making such gift or donation, to wit, on the fourth and sixth days of September, 1860, Sir George Simpson, though sick with his last illness, was of sound mind and capable in law of making such gift or donation; seeing, moreover, that, in the act itself of making such gift or donation there does not appear to this court anything unreasonable, irrational, or indicative of unsoundness of mind on the part of Sir George Simpson; and, inasmuch, therefore, as Defendants, in their said qualities and capacities, have failed to establish, by legal and sufficient testimony, the material averments of their plea firstly pleaded, doth overrule, reject and dismiss the said plea; and the court proceeding to adjudge upon the merits of Plaintiff's action and *demande*, considering that Plaintiff hath established, by legal and sufficient evidence, the

material allegations of his declaration, and particularly that the order or check dated 4th September, 1860, and upon which the present action rests in part, was drawn and made payable to the order of Plaintiff, at the request and by the order and direction of Sir George Simpson, voluntarily and without any fraud, suggestion, or improper influence on the part of Plaintiff, or on the part of any person or persons whomsoever, and was in like manner duly signed and delivered to Hopkins, his private secretary, with precise and strict directions to him, Hopkins, to deliver the same to Plaintiff for his sole benefit and behoof; and considering that it is clearly apparent from the evidence of record, and in an especial manner by the memorandum of the 6th September, 1860, made and prepared by order of Sir George Simpson, and by him fully sanctioned and approved, that it was the will and intention of Sir George Simpson thereby to make a gift or donation of the amount or sum of money in the said order or check, and in the said memorandum specified, to Plaintiff, as a token of his remembrance, and of his friendship and regard for Plaintiff, and in requital of past friendly acts; considering that, although the medical testimony adduced is conflicting, and not entirely conclusive in establishing the state of Sir George Simpson's mind during the period of his last illness, yet, that it clearly results from the whole of the evidence adduced that, during the 4th, 5th and 6th days of September, 1860, Sir George Simpson enjoyed several intervals of reason, and was, at different times, on those days, in a rational and sound condition of mind. And seeing that it is proved that, at the time and times of making and signing the order and check above mentioned, and of manifesting the intention aforesaid, not only verbally, but by the memorandum aforesaid, Sir George Simpson was restored to and shewed lucid intervals of reason, and exhibited a sound and rational state of mind. Considering that, in the opinion of this Court, there is no rule or principle of law fixing a duration of a lucid interval or the intermission of delusion, hallucination or insanity, in order that acts done in those intervals or intermissions should be valid in law; and considering, therefore, that, at the time and times of making and signing the order or check aforesaid, and of making the gift or donation aforesaid, as manifested by said check, and by the said memorandum of the 6th of September, 1860, Sir George Simpson was capable in law of making such gift or donation; considering also that from the act itself no indication of frenzy, folly, or mental incapacity on the part of Sir George Simpson arises or can be inferred, but, on the contrary, the gift or donation is not excessive in amount, considering the fortune left by

Sir George Simpson, or unreasonable when the position of Plaintiff and his friendly relations with the deceased are borne in mind; seeing, moreover, that from the manner of performing the act in question, insanity or an otherwise irrational state of mind cannot be presumed, but the reverse; and considering that the delivery of the said order or check of the 4th of September, 1860, by Sir George Simpson to Hopkins, under all the circumstances proved relative thereto, was by law and the jurisprudence of this country equivalent to actual and immediate delivery, *tradition réelle*, to Plaintiff; seeing that the making, signing and delivery of the order or check and the reiterated intentions of Sir George Simpson relative thereto, both written and verbal, in the manner and under the circumstances proved, constituted and was in law a gift or donation, *don manuel inter vivos*, of the sum of money therein specified by Sir George Simpson to Plaintiff, considering that, inasmuch as by the order or check, and the memorandum of the 6th September, 1860, Plaintiff became, and was, and is entitled as the donee of Sir George Simpson to have and receive from Defendants, in their said qualities and capacities, the sum of money claimed by the present action, it follows that by the actual delivery afterwards of the said order or check by Hopkins to Plaintiff, Plaintiff was entitled to receive the amount of said check or order upon presenting the same for payment thereof; considering that, by the decease of Sir George Simpson previous to the presentment of the said order or check for payment, the said gift or donation did not by law lapse or fail, nor could the payment of the said order or check be legally refused, the order or *mandat* therein contained not being extinguished by the death of Sir George Simpson, but, under the circumstances of this case, continued thereafter to be and is now in full force and effect; seeing that the said gift or donation is undisputed by any creditor of Sir George Simpson, but is questioned and disputed by Defendants only the executors of his last will and testament; considering, therefore, that the amount and sum of money granted as aforesaid, and mentioned in the said order or check of the fourth September, one thousand eight hundred and sixty, and in the said memorandum of the sixth September, 1860, constituted and is in law a legal and valid claim now against and upon the estate and succession of Sir George Simpson, and is recoverable from Defendants in their qualities and capacities by them admitted of executors of the last will and testament of Sir George Simpson. Doth maintain Plaintiff's action, and doth adjudge and condemn Defendants, in their said qualities and capacities, to pay and satisfy to Plaintiff the sum of one

thousand dollars, being the amount of the said gift or donation, *don manuel*, with interest thereon from the fourteenth day of October, 1861, date of service of process, till paid, and costs of suit."

The points and authorities referred to by the counsel in appeal were in effect the following:

On behalf of the Appellant: 1. The *check* is sued on as a *don manuel inter vivos*, and the portion of the judgment having reference to the check characterizes it as such. To render such a donation valid, there must be, says Bourjon (tom. 2, tit. 4, ch. 1, s. 1, Nos. 1, 3, 4.) "*Dépouillement effectif, irrévocable,* "*ce dépouillement n'est pas une simple forme, mais l'essence* "*même de la donation, et sa base.* And, in speaking of the "distinctive character of donation *inter vivos*, he says, it "ought to be quite clear, *que le donateur a préféré le dona-* "*taire à lui-même et non seulement à son héritier.*" The rule on this point is thus laid down in the Nouveau Denisart, *vbo* Don. entre vifs, § VII, No 5, pages 40 and 41, "la tradition "requise pour la validité des donations entre vifs, est une tra- "dition *parfaite et consommée.* Il faut que celui qui donne "*cesse de posséder;* que celui auquel on donne, commence à "posséder, *il ne suffirait pas* que celui qui donne, *abandonne* "*la propriété* de la chose donnée. Par cette abdication, elle "peut cesser de lui appartenir; *mais elle n'est pas encore la* "*chose du donataire qui ne s'en est pas mis en possession.*" Demolombe, *Traité des Donations*, &c., 1 vol., No 22, pages 21, 22, states the point thus,—"*Le dépouillement actuel et* "*irrévocable* du donateur au profit du donataire, tel est le "second caractère *distinctif et essentiel* de la donation entre "vifs, c'est-à-dire qu'il est *indispensable*, que dès l'instant où "la donation entrevifs s'accomplit, le donateur soit *dessaisi* "de manière *à ne pouvoir plus se repentir.*" Troplong, *Traité* "*des Donations*, &c., vol. 2, No 1046, p. 411, says:—"Le don "manuel *tire sa force* de la *dépossession actuelle et irrévocable* "du propriétaire. *Ce n'est pas un don manuel que celui où* "*l'on trouve d'autres combinaisons.*" The Respondent contended that no delivery of the check was made to any one, and Hopkins received delivery of the check for and as the attorney or *negotiorum gestor* of Respondent. On the question of delivery to a stranger, as here contended for, the rule is thus stated in the Nouveau Denisart, *verbo* Don. entre-vifs, § XII, p. 62, No. 10: "Lorsque l'étranger "auquel on remet la somme est *père, tuteur, adminis-* "*trateur, ou mandataire du tiers,* au profit duquel la "somme doit être employée, il la reçoit pour le donataire, qui "en est saisi par son ministère dès le moment de la tradition. "*Au contraire,* lorsque l'étranger auquel on remet la somme

" *n'a aucun de ces titres*, on ne peut pas dire qu'il la reçoive " pour le donataire et en son-nom. *Il est regardé alors comme* " *le mandataire du donateur.*" 2. If the check can be regard- " ed as a donation at all, it was one *à cause de mort*, and is therefore null and void. The check was signed during Sir George Simpson's last illness, and comes therefore clearly within the provisions of the 277th article of the Custom of Paris, " Toutes donations, *encore qu'elles soient conçues entre-* " *vifs*, faites par personnes gisant au lit, *malades de la mala-* " *die dont elles décèdent, sont réputées faites à cause de mort*, " et testamentaires, *et non* entre-vifs." Besides, Hopkins distinctly states that it was intended as a *parting* gift, and that he locked it up with the other checks, in order that should Sir George recover, there might be no record for him to see how ill he had been. Under all systems of law, at any time prevailing in the *pays coutumier*, in France, *donations à cause de mort* were utterly null and void. 3. It is contended by Respondent that the check is a will. The case mainly relied on is that of *Bartholomew et àl.* vs. *Henley*, 3 Phil., p. 317, but, there, the testator, in the margin of his check book, distinctly declared that he intended the checks to be bequests, and the checks and records in the book were all proved together. Without however discussing whether a check might or might not have been proved as a will, under particular circumstances in the Ecclesiastical Courts in England before the passing of the 1st Vict., ch. 26, it is enough to say here, that the check, as soon as it got into Respondent's possession, was treated by him as an ordinary check and protested by him for non payment. Moreover, the present action is brought on the check, as a *donation manuelle inter vivos*, and in no way as a will, and no attempt was ever made to prove it as a will. No action can be brought on a will of personalty without probate. (1) 4. The memorandum of the 6th September, 1860, is claimed by Respondent to be a *written* will or codicil. In Respondent's declaration, it is alleged to be a codicil to the written will of the 10th of March, 1860, made by *word of mouth*, and according to one count of the declaration, " at the request of George Simpson, *committed to* " *writing* by Hopkins, of Lachine, in the presence of the " testator and of numerous witnesses, and immediately there- " after read over to the testator, and approved and con- " firmed by him," and (according to another count of the declaration) " *put into* writing, within six days from the " *speaking*, declaring and publishing of such words." If

(1) Williams, on Executors, vol. 1, page 239, (Eng. paging, 4th ed.) : 1 Jarman on Wills, page 211.

this memorandum be a testamentary paper at all, it is clearly nothing more than a *nuncupative will*, reduced to writing, and, therefore, falls within the provisions of the statute of frauds. (1) Now, by that statute, it is distinctly enacted, that no such will "shall be good, that is not *proved* " by the oaths of *three* witnesses (at the least) that were *pre-* " *sent* at the making thereof; nor, unless it be *proved*, that " the testator, at the time of *pronouncing* the same, did *bid* " *the persons present*, or some of them, *to bear witness* that " such was his will." And that no such will shall have the effect of repealing, or altering, or changing any clause in a " will in writing concerning any goods or chattels, or personal " estate, except the same be in the lifetime of the testator " committed to writing, and, after the writing thereof, read " over to the testator, and allowed by him, and *proved to be* " *so done* by *three witnesses at the least*." It is submitted, 1st, that such witnesses must be disinterested, and that the legatees are wholly incompetent. (2) 2nd. That the testator must be proved to have *pronounced* the will; and 3rdly., that it must be *proved* that he *bid* the persons present to *bear witness* to his will thus pronounced. (3) A nuncupative will, when *all* the formalities of the statute of frauds are complied with, may possibly become or be considered a *written* will, but, to make it so, all the statute requires as to proof *must* be *strictly* attended to. As to the character of the witnesses, they must be such as at the time of the passing of the statute of Anne, (4 and 5 Anne, ch. 16, s. 4,) would have been "good " witnesses on trials at law." The Respondent contends that the statute 25 Geo. 2nd, ch. 6, so interfered with the statute of Anne as to render legatees competent witnesses to prove a will or codicil, by annulling their legacies, but the statute relied on is evidently confined to wills of *real* property, and has been always so regarded in England. (4)

On behalf of the Respondents: First. That donations made under circumstances such as are disclosed in this case have

(1) 29 Car. 2, ch. 4, s. 19, 21 and 22.

(2) Vide 1 Jarman, on Wills, p. 63, (English ed.), and 104, 105, (Am. ed.); Lovelass, on Wills, p. 161, (Am. ed.), and 301, (English ed.); Swinburne, on Wills, p. 347; Williams, on Executors, 1 vol. page 278, (Eng. paging, 4th ed.)

(3) Vide Statute of Frauds, *loco citato*; Lovelass, on Wills, pp. 181, 182, (Am. ed.), 339, 340, (Eng. ed.): 1 Jarman, on Wills, pp. 130, 131, and notes (Am. ed.), 89 and 90, (Eng. ed.); 2 Blackstone's Com., p. 501, old paging; Williams, on Executors, vol. 1, pages 99, 100, 101, (Eng. paging, 4th ed.)

(4) Lovelass, on Wills, p. 302, (English paging, 12th ed.); 1 Williams on Executors, p. 278, (English paging, 4th ed.): 2 Williams, p. 907.

been recognized as valid. (1) Second. That, under our Law, donations of moveables may be made without writing, and by simple delivery. (2) Third. That, by the French Law, a check is treated as a note payable to bearer, and passes validly from hand to hand. (3) Fourth. That a check payable to a person named in it, is not revoked by the death of the maker. (4) English authorities for Respondents as to form of will. (5) As to validity of checks and drafts as wills. (6) As to effect of probate. (7) As to the medical testimony. (8)

BADGLEY, J., gave this judgment: On the first day of September, 1860, as Sir George Simpson was driving to his residence, at Lachine, from Montreal, he was suddenly attacked by a fit under the effect of which he was carried into his own house in a state of insensibility. The resident physician at Lachine, Doctor DeCouagne, who had already attended him, was immediately in attendance, and continued with him until his death, on the 7th. Dr Sutherland, of Montreal, was also called in, and attended upon him until the 6th, as consulting physician. The state of insensibility disappeared in the afternoon of the day of the attack, but Sir George died on the following 7th, in the forenoon. During his illness, having become fully aware of the fatal result of the disease, he expressed his desire to show his parting good will and kindness to his servant and to some of his friends; on the 3rd he directed a check for £300 to be drawn in favour of his servant, which he signed and himself gave to him, accompanied with some kind remarks.

(1) 16 Bréard de Neuville, Pandectes de Pothier, p. 209: Ib. 6 vol. p. 311: 2 Journal des Audiences, pp. 343, 351, ch. 59; Arrêt du Parlt. de Paris, 15 Déc. 1664: Merlin, Quest. de Dr. vbo. Donation, No. 1: 3 Augeard, p. 135, Arrêt N., 49, No. 12: Nouveau Denisart, vbo. Dépôt, sect. 1: Danty, Preuve, ch. 3, p. 104, No. 6: Merlin, Questions de Dr., vbo. Donations, sect. 6: Pothier, Donations, sect. 2, art. 1: 9 D'Aguesseau, pp. 361, 448, 450: Troplong, Dépôt, No. 149, p. 119.

(2) 1 Grenier, Donations, pp. 418, 421, 424, 426.

(3) Pardessus, Droit Com., part 3, tit. 2, ch. 10, No. 457: 3 Gouget et Mercier, p. 749, vbo. Mandat de Change.

(4) Troplong, Mandat, pp. 661, 718, 737, 738: 2 Augeard, Arrêts Notables, p. 135: Nouveau Denisart, vbo. Donation entre-vifs, sect. 12: 5 Toullier, No. 172: 2 Troplong, Donations, Nos. 1047, 1055: Troplong, Dépôt, Nos. 146, 159.

(5) Swinburne, pp. 10, 11, 63, 64, 67, 76, 80, 82, 87, 89: 1 Peere Wms. p. 440: 2 Chitty's Blackstone, pp. 500, 501: 2 Phil. Ec. Cases, pp. 213, 177: 1 do., p. 12: Williams, on Executors, pp. 49, 51, 56: Jarman on Wills, (Ed. 1849), pp. 11, 12, 19: 4 Kent, Com., p. 517: Petersdorff's Ab., vbo. Wills, pp. 401, 402: 5. *R. J. R. Q.*, p. 244.

(6) 3 Phil., p. 317: 2 Eng. L. and Equity Rep., p. 51: 14 Jur., p. 675.

(7) 1 Williams, Executors, pp. 339, 340: 1 Jarman, p. 28: Greenleaf on Evidence, 2, sect. 672: 4 Burns, Ecc. Rep., p. 107.

(8) 1 Bell's Commentaries, Book 2, part 2, c. 8, sect. 2.

On the following day, the 4th, he also directed other checks for different amounts to be drawn in favour of Respondent and other persons, which he then and there signed, and of which on the 6th he desired his private secretary, in the presence of witnesses, to make a memorandum in writing as of his last bequests, namely, of the amounts which he had given by the checks referred to, which were severally read over to him in detail from the memorandum, and then and there acknowledged and approved of by him. He died possessed of great wealth, which he had disposed of chiefly amongst his children by his last will, dated the 10th of March, 1860, probate whereof was duly granted on the following 6th of November, and in which last will Appellants were appointed his testamentary executors; they accepted the office, and still continue to act as such. The checks drawn on the 4th remained in the possession of Hopkins until after Sir George's death, and also thenceforward for some time as agent of the executors who were made fully aware of their existence, and how they had been drawn: they did not go into the inventory of the estate, but remained in his hands as such agent. The check, the subject matter of this contention, was demanded of Hopkins as such agent by Respondent; and the executors having left it to him to decide whether he held it for the estate or for Respondent, he determined in favour of the latter, and gave it up to him because it had already been charged against and passed from the estate. On the 11th October, 1861, probate was granted of the memorandum of bequests drawn up by Hopkins as stated above, as a codicil to Sir George's will, and the check having been refused payment by the executors this action was instituted against them for the recovery of its amount. The declaration sets out the cause of action under four different counts: 1st, that the check was a *don manuel*, a gift from the deceased to Respondent, left with Hopkins by Sir George, to be delivered to the donee; 2nd, that it was a *don manuel* confirmed by the approval of the deceased by the subsequent memorandum; 3rd, that the drawing and delivery of the check, followed by the making of the bequests by writing the same in the memorandum was a confirmation of them, and of which bequests probate was granted on the 11th October, 1861; 4th, that the bequests were a codicil to the will, and probate of that codicil was granted at Montreal. To this action the Appellants pleaded: " That, on the fourth day of September, 1860, Sir George Simpson was labouring under disease of the brain, with which he had been some time previously attacked, and of which he died on the seventh day of September, 1860; that Sir George Simpson was not, on the fourth day of September, 1860, " of sound and disposing mind, memory and

understanding," but, on the contrary, was, throughout the whole of that day, and, for some time previously, had been, and, from that day until his decease, continued to be, of unsound mind, memory and understanding, and wholly incapable in law of contracting or of disposing by last will and testament or otherwise; that, moreover, at the time the memorandum of bequests purports to bear date, Sir George Simpson was not "in full possession of his mental faculties, and of sound and disposing mind, memory and understanding," and, on the contrary, was, and, for some time previously, had been, and from that time until his decease continued to be, of unsound mind, and wholly incapable, in law, of contracting, or of disposing by last will and testament, or otherwise." The real issue then in this cause is the incapacity of the deceased to make the bequest or disposition in controversy, either as a donation or as a legacy, by reason of his alleged continued mental alienation during the entire period of his illness, from his first attack on the first of September, until the termination of his malady, by his death on 7th of the same month. It must be premised that, at the time of his attack, Sir George was in his natural normal state of sanity, and in the full legal enjoyment of his civil rights; he was *integer status*, and had the entire full capacity of disposing of his property and estate either by donation or by last will, as he might think proper. This capacity, which in all men not formally and judicially interdicted from its exercise, is indisputable, is the general rule and principle of our law, but it is subject nevertheless to disqualifications which are exceptions to that general rule, and which, under certain states of mind, impede and even prevent its exercise altogether; these are called incapacities, and are either relative or absolute. It is with the relative incapacities that we are called upon to deal in this cause, because, if present, they would prevent any valid disposition of property by the disponent during their existence; they are technically known as incapacities of fact, and apply to all donations whether *inter vivos* or *causa mortis*, as well to legacies as to bequests by will. The chief of these proceed from mental alienation, that is, the condition of not being *sain d'esprit*, or, as forcibly expressed in the words of the 292nd Art. of the Custom of Paris, as the state of "*une personne non saine d'entendement.*" To constitute the mental sanity required by the law, two conditions are essential: the first, intelligence or the power to understand and know the nature and character of the act to be done, and the second, volition or the power of willing to do the act and of manifesting that will. It may be stated *in limine* that no imputation is cast upon the bequests so made by the deceased by reason of suggestion or influence

practiced upon him for the purpose of inducing him to make them; the objection is simply his mental alienation and want of disposing mind at the times in controversy. The circumstances relating to or connected with the doing of an act are necessarily and altogether matters of fact, and hence arises the question, had the disposing person sufficient intelligence and will to make the disposition? If a condition of positive imbecility, folly or madness be established as present at the time of the disposition, or in other words if a state of mental alienation then existed, it is plain that the answer would be in the negative. It is indifferent what denomination psychological science may give to the mental affection, or whether it is termed folly, madness or fury by physicians, the nomenclature given to the mere disease is of no moment, but it is important in a legal point of view that its extent and power should be judicially appreciated by courts of justice. Judicial respect is doubtless due to the teachings of medical science and to the researches and discoveries of its interpreters and professors, which are so frequently brought forward in controversies of this description; but judges are charged to estimate and appreciate the reasonings and inferences of psychology and medicine from their own legal and judicial point of view, as well in respect of their application of them to civil life as in regard to the conduct of the individual which is submitted, to them for their decision. Judges are not called upon to prosecute an inquiry, with more or less of merely medical science alone, into the influence of any particular cerebral lesion upon the faculties of man in general, but to ascertain and determine whether the individual in question did still preserve a sufficient mental capacity validly to make the act in contestation. Medical science is not more positive and infallible than many other sciences; and it is notorious that perfect unanimity and certainty do not always prevail amongst medical practitioners. "Who shall decide when doctors disagree" is a question still requiring an answer in pathology as well as in ethics; and as regards mere medical science and its professors, their fallibility has been strongly exemplified in the conflicting and contradictory opinions and doctrines advanced and propounded with very peremptory assertion by the several medical witnesses who have been examined in this case. It is not proper to deny, nor will it be here denied, that medical inferences and opinions may be, and frequently are of great importance in the administration of justice in cases of this description; but judges in their researches into the full merits of such cases must recur to facts, to the proved condition of the mental faculties exhibited by the individual disponent himself, and to all the actual particular

circumstances connected with that condition, to determine whether he had retained or lost the intelligence and will necessary to enable him to effect a valid disposition of his property. Was he, to use the technical Latin terms, *demens*, deprived of mind *mente captus, mentis non compos*, or, in the language of our common law writers, was he, *insensé* or *fou*, under which terms they comprehend the various phenomena of intellectual derangement. Speaking under the guidance of our municipal law, it is indifferent whether the disponent was or was not in a permanent state of alienation or in an accidental and temporary state of such derangement when the disposition was made, because the existence of sufficient integrity of mind to do the act at the time of making it, and which of itself is the work of the mind, must be shown and established; hence the derangement of the intellectual faculties which might possibly be only the momentary result of sickness. Febrile delirium, for instance, may cause that temporary mental insanity which is as positive an obstacle at the time to the exercise of the disposing power as the most persistent and continuous state of madness. Paulus gives us the following dogma: *In adversa valitudine mente captus eo tempore testamentum facere non potest.* L. 17 § qui testam facere poss. But it is equally true that merely physical or corporal maladies or infirmities are not to be taken into the consideration. "*In eo qui testatur, ejus temporis qui testamentum facit integritas mentis, non corporis sanitas exigenda est.*" Labeo L. 2 § qui testam facere poss, or, as Ricard, *Traité des donations*, part. 1, Ch. 1, Sect. 1 and 11 says: " il faut distinguer la capacité intérieure, celle de l'esprit, d'avec la capacité extérieure, celle du corps." However severe, therefore, a bodily malady may be, however cruel the pain and suffering it may occasion, in and of itself does not incapacitate a person from validly disposing, if it do not take away his mental sanity; and that power of disposition may even reach to the extremest period of the malady and to the approach of death itself, *balbutiens lingua*, without incapacitating, so long as mental sanity remains. The condition, therefore, of the disponent at the time of making the disposition is all important, and it is moreover one of fact, to be established by evidence, and therefore, the question arises upon whom the obligation should fall of making that proof? It is authoritatively held by our law that it falls upon the party alleging the insanity, not alone because he alleges the fact of the then present insanity, but also because he affirms a fact that is contrary to the presumptions of nature and of law, which hold that man in general is of sane mind, and that madness is an accident, an exception. Upon this part of the case, the following citation

from Dalloz, Jurisp. Générale du Royaume Vo. *Dispositions Entre-vifs*, p. 205, is applicable and appropriate: "Les tribu-"naux n'admettent qu'avec circonspection, la preuve de la "démence d'un homme mort en possession de son état: Les "demandes d'annulation pour cause de démence doivent être "appuyées sur des faits précis et nettement articulés. Les ma-"gistrats ne les reconnaissent comme concluants, que lors-"qu'ils contiennent une démonstration complète. Jamais ils "ne procèdent par induction, parce qu'il s'agit d'une incapa-"cité." The evidence, therefore, to establish the alleged insanity of Sir George Simpson, when he made and acknowledged his disposition in this case, namely, when he made the check the present object of contestation, and when he recognized and assented to the memorandum of bequests containing that check, must possess the requisites of legal testimony, liable of course to be controverted by conflicting legal testimony, and subject also to be considered and examined not in a medical but in a legal manner, and according to the distinctions and discriminations of law. The evidence adduced by Appellants, Defendants, upon the point of Sir George's insanity at the period in question, is confined to the testimony of two physicians, Dr. Sutherland, who was in occasional attendance upon the deceased during his illness, as consulting physician, and Doctor Workman, the Superintendent of the Insane Asylum, at Toronto, as that of an expert in cases of insanity, who did not see Sir George at all, and who was asked to express his opinion, upon an examination of a part of the adduced testimony submitted to him. The testimony of the former is the only direct evidence in support of Appellant's plea, and his deposition shews that his opportunities of personal communication with the deceased were few and limited. Sir George was brought home insensible about noon on the first September, the witness reached him some three hours later, and continued in attendance for an hour. Early on the morning of the 2nd, his visit lasted for fifteen or twenty minutes, on each of the mornings of the 3rd and 4th, a similar visit of equal duration, and a late evening visit of twenty-five minutes on each of these days, and an early morning visit of a few minutes on each of the 5th and 6th: he did not attend on the 7th, the day of Sir George's death. Now, including the first day when he says Sir George was insensible, and his visit reached to an hour, and the 6th, when he says that Sir George was in a state of coma or utter stupor, the attendance of the witness altogether extended to about three hours. It is not intended to question the sufficiency of the time given, but merely to shew the limited periods for personal communication with the deceased. During all the other periods of the

disease, the witness of course cannot testify of his own knowledge, either of the conduct or condition of the patient, and for those periods can only report the hearsay communications of others. Opposed to this witness are those brought forward by Respondent, the intimates, the friends and the relatives of the deceased, who knew himself, his manner and disposition, and who were with him during his malady. These were Doctor DeCouagne, the resident physician at Lachine; Murray, his only male servant for eight years; Mr. McKenzie, his friend for thirty years, and for nearly two years at time of his malady, his guest; Mr. Hopkins, his private secretary for upwards of twenty-five years, all of whom were in close attendance upon him from his first attack until his death; Mr. and Mrs. Cameron, his son-in-law and daughter, who reached him from Toronto in the early morning of the 4th, and were with him until he died. The Reverend Mr. Simpson, the Presbyterian Pastor at Lachine, whose ministry Sir George attended, was with him occasionally from the 4th; and Dr. Thorburn, his friend and connection, who arrived in the morning of the 6th, and remained with him until his decease. It is from these witnesses that Respondent has drawn his direct testimony; and it is with the facts in evidence therein that the testimony of Dr. Sutherland must be confronted and compared. The testimony of this witness consists of his personal observation and communication with the deceased, of the professed reports and communications of others which he sets out in his deposition, and of his professional medical opinion upon the nature of the disease and its effects upon the mental capacity of the disponent during his illness. A daily statement was prepared from the evidence of Doctor Sutherland, as shewn in the factums and confronted with that of Respondent's witnesses from day to day, as given by them, to serve for my personal reference in settling this case, and need not be noticed here; it will suffice to detail therefrom the daily occurrences, demeanour and language of the deceased, his sayings and doings as it were, presented as facts from day to day, by the witnesses themselves, because, as already observed, the issue is to be decided upon the facts in evidence, not upon merely medical opinion. Although consideration is due from courts of justice to such opinions, they cannot be allowed necessarily and absolutely to control judicial decision. Whatever may be the experience of the physician of the cause or course or period of a patient's physical suffering and life, his capacity to dispose of his property does not, before courts of justice, repose upon merely psychological or medical opinions and inferences, but upon all the facts and circumstances of the disease and its continuance, and, as they

are connected with and exhibited at the making of the disposition; and, therefore, it is, that as facts are never really opposed to facts, it must be upon the adduced evidence of facts that the issue in this cause must be adjudged, and from a legal and not a medical point of view. The facts then shewn in this cause from the first are as follows, as taken from the printed evidence in the factums of the parties, which will be set down in order, but will not presently be read to save the time of the Court, but will of course be open to the parties for examination. They are as follows: Sir George Simpson, *a man of good health, of great strength of constitution*, was attacked *by apoplexy* or by *a fit of epilepsy threatening apoplexy*, about noon on the first of September, which produced temporary insensibility. The attack subsided in the afternoon, and Doctor Sutherland directed Mr. Hopkins to inform Sir George's children, then at Toronto, "not to come to him, that he was better." Towards the evening, Sir George became sensible and spoke rationally and thence continued to improve, so that Doctor Sutherland found him early in the morning of the 2nd "to common observation better, cheerful and gay, " declaring that he would be well to-morrow, indifferent as to " his state and smoking a cigar." Doctor DeCouagne, his close attendant, pronounces him *totally conscious* all that day; and Mr. Hopkins from the early morning, found him *convalescent, with his mind quite clear, and anxious to converse on business subjects*, which Mr. Hopkins dissuaded him from doing, and contended himself with repeating to him the substance of a number of letters which he inquired about. This state of consciousness and reason continued during that night, and lasted until towards the afternoon of the 3rd. Upon Mr. Hopkins' early morning visit, very shortly after Doctor Sutherland's departure that morning, Sir George appeared to be better, but " was impressed with the belief, in consequence " of something Dr. Sutherland had said to him, that his case " was more serious than had been supposed." He then made particular inquiry about the letters received by that morning's mail, the substance of which was repeated to him by Mr. Hopkins. Amongst them was one from General Bruce, respecting some horns Sir George had given the Prince of Wales. Sir George thereupon mentioned which horns he wished to be packed and forwarded to the Prince and begged that matter to be attended to immediately. Another matter he spoke about was a pending suit between the Ebbwvale Company, for whom he acted as attorney, and the Ottawa and Prescott Railway Company; he begged Mr. Hopkins to write to the Ebbwvale Company, stating that, as he could not now act as Receiver, he would recommend Mr. Harris, of

Ottawa, for that office. He next asked where his will was? Upon being informed that one copy was in the safe (then at the Hudson's Bay House) and a duplicate was at the Bank of British North America, in Montreal, he replied, "Quite "right be sure you send the copy here to Mr. Finlayson" (one of the Defendants.) Between 10 and 11 of the same morning he expressed his desire to do something for his faithful servant, James Murray. Mr. Hopkins stated he thought Murray was perfectly satisfied, and not to trouble himself upon such matters; he persisted, however, and requested Mr. Hopkins to go to the office and draw out a cheque in Murray's favour, for three hundred pounds, and to bring it to him for signature. This was done, and after the cheque was signed, it was cut from the Cheque Book, and Sir George handed it to Murray himself, saying "there is a present for you, you "did not think that you were going to lose me so soon, had "I lived longer, it would have been better for you. I want "you to remain at my place," meaning the Island. In the afternoon of the 3rd, he became delirious, but, by the morning dawn of the 4th, he was again better, and gradually recovered his consciousness and was able to converse and speak rationally. During the night, from the 3rd to the 4th, Mr. McKenzie, whose bedroom adjoined Sir George's, says, that he was up and down with him the whole night, and when he wanted anything he called him (McKenzie). Later in the morning of the 4th, he frequently wished Mr. McKenzie to draw a cheque for himself: but he endeavoured to get Sir George's mind off the subject altogether. Mr. McKenzie says: "He said to me that we had long been acquainted, long "friends. It being my impression then that he would reco- "ver, I said to him that we would both be laughing at "this before long; he said "No," and then wanted me again "to draw out a cheque; I then said—If you insist upon it, "Mr. Hopkins will soon be here, whose duties it is to draw "cheques, and he will do it," the matter then dropped. But Mr. McKenzie distinctly avers that Sir George was perfectly calm and collected when he spoke to him about the cheque. Mr. and Mrs. Cameron, and her two sisters, Sir George's children, reached him at about eight that morning; when they went into his room, he knew them all, called them by name and retained their hands some time in his; he was perfectly calm, and spoke to them with tears in his eyes. Mr. Hopkins having come into the room upon business with Sir George, his family withdrew, but Mr. Cameron testifies that when they left him, with Mr. Hopkins, he seemed quite capable of attending to business. After they had retired, Sir George intimated his wish that a cheque should be drawn for Mr.

McKenzie, which Mr. Hopkins dissuaded him from doing, and told him not to think of parting from his friends: but Sir George said, "why do you thwart my wishes, and try to "deceive me with hopes of recovery. I am a dying man." Mr. Hopkins then urged delay, at all events, but Sir George said, "I have no time to lose, besides, what is the use of delay? it "will not hasten my death to settle what I have on my mind." As Mr. Hopkins was going to execute Sir George's wish in that respect, he called him back, and directed cheques to be prepared for the other persons mentioned in the memorandum of bequests, accompanying each with observations and reasons for making the cheques for each of them. Mr. Hopkins says as to Mr. McKenzie, "upon going to Sir George's room I made "inquiry respecting his condition, &c., when he said to me, "I "have been anxious to see you for some time, McKenzie has "been most attentive to me; I have known him a very long "time, and always esteemed him: I wish now to show my "regard by making him a present of five thousand dollars." "I had previously learned from Mr. McKenzie that Sir George "wished him to draw a cheque for that amount, in his own "favour, which he declined doing, as it was in my department. "With reference to the Reverends Mr. Flanagan, the Respon-"dent, and Simpson he said, "Mr. Flanagan has been very "useful to me, and most discreet in everything he has under-"taken. I wish to make him an acknowledgment of my obli-"gation to him; I was thinking of giving a hundred pounds "to each of the parsons (meaning Mr. Flanagan and Mr. "Simpson), but that is scarcely enough, do you think one "thousand dollars each would be considered as doing the "thing liberally?" I said it was more than liberal, it was very "generous. Sir George said, "I am glad to hear it; that is "what I should wish." As to Mr. Cameron, his son-in-law, he soon after said: "there is Cameron, I wish to do something "for him, what do you think would be fair and liberal in his "case?" As I hesitated in my reply, Sir George said, "What "did I give him on his marriage?" I replied, four thousand; Sir George said, "You mean dollars?" to which I replied in the affirmative. He asked if I thought that would be a proper sum to give Cameron; I stated that I thought it liberal, but that it might be better, to avoid unpleasantness, to put Cameron and McKenzie on the same footing. Sir George said, "You are quite right, make them both five thousand "dollars, and yourself the same." He soon afterwards added, "We are very old friends, few people have been so much "together, and have got on so well; I am indebted to you "for long, useful and kind services, it is very hard to have "to part now; he shook my hand, and turned his head

"away, apparently much affected." About mid day of the same day, the 4th, Mr. Hopkins testifies he had further conversation on business with Sir George, at his request; "he "gave me instructions upon several points, amongst others, "that James Murray and his family should remain at Isle "Dorval, also respecting the transmission of his will to England. He then said, after a considerable pause. "You will "write to the Company, saying I have left the business of "this establishment in your charge, McKenzie will go to the "Ottawa, as already arranged." Before I left him, he sent "farewell messages to my wife and sister, regretting he had "seen so little of the latter (she had lately arrived from England), and also to some of the members of my family in "England, specifying them by name." About one o'clock of the 4th, the Rev. Mr. Simpson attended Sir George officially, and entered upon religious conversation with him. He testifies that Sir George was quite sensible of the dangerous nature of the last illness, and though he soon got tired he spoke distinctly and rationally; and Mrs. Cameron adds that it was some hours after their arrival that morning that Sir George first became unconscious, and he was so at intervals throughout the remainder of the day. By six of the next morning, the 5th, Sir George was better; he was very calm all that day, and passed a quiet night with his mind perfectly clear, and had no more fits after that. His consciousness and clearness of mind continued through the following day and night, the 6th, and he was sensible until within an hour or two of his death at about eleven of the next morning, the 7th, doctor Sutherland says of his last visit early in the morning of the 6th, that he had no conversation with Sir George, that he was in a state of coma, which he explains as that of utter stupor, but his testimony of this day is distinctly contradicted by Mr. Cameron and Mr. McKenzie. Mr. Cameron testifies to his own presence in Sir George's room part of the time of doctor Sutherland's last visit in the morning of the 6th, he says: "I recollect that the Doctor addressed him "(Sir George), and spoke to him as if he thought him unconscious, at which Sir George seemed a good deal annoyed, and "replied shortly and sharply; as I left soon after the Doctor "came into the room, I cannot say what the conversation "was about. I left Mr. McKenzie in the room with him." And Mr. McKenzie details what occurred, "I heard Sir "George conversing with doctor Sutherland, of Montreal, "the last time the Doctor saw him alive, I think about "eight o'clock on the morning of the 6th. When the Doctor "came into the room Sir George said "Well, Doctor, this "is the last scene of all" and the Doctor said, "Yes, Sir "George;" the Doctor, then approching his bedside, asked

" Where would you wish to be buried, Sir George ?" Sir
" George seemed to me to look at him with astonishment,
" and said, " In the Montreal Cemetery, of course ;" then the
" Doctor asked : " Would you wish to have a monument erected
" over your grave ?" and Sir George said : " There is a monu-
" ment there already ;" the Doc or said : " Would you wish
" any particular inscription upon it ?" Sir George then said :
" That is the business of my executors, not yours." M. Mc-
Kenzie also added that Sir George was perfectly sensible,
quite calm and collected in his mind during this conversation.
The testimony of Doctor Thorburn, who arrived about nine
that morning, and remained with Sir George until his death
is as follows : " When I arrived on the morning of the sixth,
" he said : " My dear boy, I am glad to see you, when did you
" come down ?" and then enquired after my wife and chil-
" dren, and made the remark, " You find me very low." Doc-
tor Thorburn then details circumstances which indicated to
his mind Sir George's consciousness ; amongst others : " He
" was always enquiring, when I administered medicines, why
" I did so, and also what effect I expected, particularly on one
" occasion, I remember, when I wished to give him brandy,
" that he expressed himself opposed to the use of brandy, and
" it was not till I assured him that it was good that I could
" persuade him to take it ; I told him that it was of the bran-
" dy presented to him by his friend, Matt. Clark, he having
" enquired where it came from, and having objected that he
" thought that I could get no good brandy ; he then said he
" would take it, for it would be good if Matt. send it, as he
" kept nothing but that which was good. I did not leave the
" house from the time I first attended upon Sir George, and I
" scarcely left the room. When I saw Sir George, he was la-
" bouring only under great exhaustion, the result of some pre-
" vious attack, of the character of which I have no knowledge
" except from hearsay ; his condition was such as is consistent
" with his having suffered from any severe attack of illness,
" including apoplexy ; he was not labouring under insanity,
" as generally understood, or under mental incapacity ; there
" is always more or less of suspension of the mental powers
" at the attack of apoplexy, which may continue or disappear.
" Frequently during his last hours, he expressed his opinion
" that he was very weak, and asked what I thought of his
" condition. During the time that I saw him, he was at no
" time in a state of profound stupor, until within a short time
" of his death, nor was he incapable of expressing himself ;
" he was capable of expressing himself until within an hour
" of his death. He seemed conscious, and although very weak,
" he was capable of hearing remarks, and of asking ques-

" tions." His servant, Murray, testifies as to the signing of the several cheques on the 4th, and adds: "Sir George was in " bed and raised himself on his arm to write them; the che- " ques were retained by M. Hopkins, who placed them before " Sir George for signature. I never saw them afterwards. Sir " George could speak quite well on that day, and his mind " was apparently quite right. From that time on, I was with " him pretty constantly, and he spoke frequently to me, but " I do not remember anything precisely that he said to me, " until Thursday morning, the sixth, when he said: "You " have not been at the Island, you'd better go and see what " they are doing there." I went up, and returned about one " o'clock, but did not speak to him, as the Doctor said, "Let " him repose, do not annoy him with anything;" It was Doc- " tor DeCouagne who said this." M. Cameron also, testifies with reference to the 6th: "During that day, I was with Sir " George a good deal; with the exception of weakness, he ap- " peared decidedly better than he had been before, and we had " strong hopes of his recovery. The others of his family were " also with him that day, as he was better able to converse " with them than he had been, and seemed pleased to have " them in the room with him. I had many conversations with " him on this day; he sometimes spoke to me in Gælic, which " he had been in the habit of using on occasions. I remember " mentioning to him that I had telegraphed for Dr Thorburn, " on my own responsibility, and he appeared satisfied, but at " the same time remarked that it was no use, meaning thereby, " that he did not expect to recover. Taking hold of my hand " he remarked, calling me by name, "Cameron, I've left you " perfectly independent; there were many other remarks " which he made to me, which I do not at this moment recol- " lect, but which perfectly satisfied me that his mind was " clear. At no time during the conversation on that day had " I reason to think that his mind was not collected. Towards " evening, Sir George expressed a desire to see a clergy- " man, and asked them to send for the Rev. M. Simpson, " who accordingly came over soon." And from Doctor De- Couagne, the testimony is as follows: "On the fourth, after " his fits of excitement were over, he at times was able to " converse, and when he did speak, he spoke as rationally " as I have ever known him to do. He would often ask me " how I found him, and how his pulse was; he would some- " times ask me what I was giving, and what was the effect " to be produced. I speak of the whole period covered by " his last illness, with the exception of the period from the " morning of the third to the morning of the fourth, when he " was completely delirious; it was towards daylight on the

" morning of the fourth when he showed the first indications " of returning consciousness. On the sixth, as I said before, " he was quite conscious the whole day." He also says that from the morning of the 6th until shortly before death Sir George was perfectly conscious and had no more fits. It was in the evening of this same day, the 6th, that Sir George caused the memorandum of his bequests to be made by M. Hopkins, who details the circumstances as follows: " On the " evening of that day, between seven and eight o'clock, on " returning from my own house, where I had been for a " couple of hours, I was told Sir George wished to see me, in " order to dispose of a matter of business which he had on " his mind. I found, in his bedroom assembled, Mr. and Mrs. " McKenzie, Mr. and Mrs. Cameron, the two Misses Simpson, " Dr. Thorbun, Dr. DeCouagne, the Reverend Mr. Simpson " and James Murray. As I entered the room, Sir George said, " " Has Hopkins come?" I went to his side and said: " Here " I am, Sir George, have you anything particular to say to " me?" he replied: " Yes, I wish you to take a memorandum " of my last bequests." As I did not exactly understand him, he " said, in explanation: Get pen, ink, and paper, quickly, and " make a memorandum of my wishes, as I have no time to " lose." Having provided myself with writing materials, I sat " down on the bedside, and stated I was ready. Sir George then " said to me, " Now put down what I have been doing, the " bequests I have made;" I said, " Do you refer to the cheques " you drew the other day?" he replied," certainly, now put them " down—what are they?" Seeing present several persons who " were interested, I felt a delicacy about proceeding, and mo- " tioned to Mr. Simpson to leave the room, when he and Mr. and " Mrs. McKenzie left the room, the two doctors were going back- " wards and forwards between the bed-room and dressing- " room, the door between the two being wide upon. The delay " seemed to make Sir George impatient, and he said," go on, " go on, why do you keep me so long?" I thereupon made a " list of the six cheques, and said," here is a memorandum of " the cheques, shall I read them over to you?" On his reply- " ing in the affirmative, I commenced as follows: Angus " Cameron, five thousand dollars—is it your wish that that " sum should be paid him?" Sir George replied," Yes, cer- " tainly, go on—why do you tease me by delay?" Either " Mrs. Cameron or Miss Margaret Simpson, or both, who were " sitting close to their father's head, repeated my question, to " which he again replied," Yes, what next?" I went on read- " ing," Hector McKenzie, five thousand dollars—do you wish " him to receive that sum?" Sir George replied," Yes, what " next?" Somebody repeated my question, when he said

" " Certainly, go on." In this way, I read out the other names " and amounts as follows : " E. M. Hopkins, five thousand dollars " —the Rev. J. Flanagan, one thousand dollars ; the Rev. Wil- " Simpson, one thousand dollars, James Murray, twelve hundred " dollars ; " after reading each bequest, I formally asked Sir " George if that was his wish, and if he wished the parties to " receive the sums which followed their names ; my questions " were repeated by others around the bed, and on every occasion, " Sir George replied," Yes," or " certainly, go on—what next ? " " After having gone over the list, *seriatim*, I said," Sir George, " am I to understand that these are your last wishes, and " that it is your desire I should make these payments ? " He " asked me the amount of the whole : I replied, eighteen thou- " sand two hundred dollars, when he said, distinctly " Yes, " certainly ; " Mr. Cameron and his daughters asked him if I " had properly understood him, and had done all he wished, " to which he invariably replied," Yes." From that time (about " nine in the evening of the sixth) his mind appeared more " at ease, and though I remained with him till he died, about " eleven o'clock next day, he never once adverted to any " matter of business." All the other witnesses more or less fully corroborated Mr. Hopkin's statement, which need not be repeated here. Murray also testifies to Sir George being quite sensible and calm at the time ; and Mr. Hopkins also testifies : " I have been so long acquainted with Sir George Simpson, " that no person could be more familiar with his manner and " his mode of thought than I,—and I could judge as well as " any one, physician or friend, if his mind was collected and " in its usual state. Upon both the fourth and the sixth, on " the occasions I have described, namely, the signing of the " cheques, and the dictating of the memorandum, I have not " the least doubt, and can say positively, that his mind was " calm and sound, and that he was in full possession of his mental faculties." Mrs. Cameron, who was present at the making of the memorandum, says : " When this memorandum " was made my father was quite sensible and able to do any " business of that sort ; there seemed to be only weakness." And Mr. Cameron, who also speaks as to the making of the memorandum, adds " He (Sir George) seemed clearly to under- " stand the whole, and expressed his satisfaction and approval ; " from the morning of the 6th until he died there was nothing " the matter with Sir George except extreme weakness." To this add the testimony of the Rev. Mr. Simpson upon the same occasion, who declares," I have not the least hesitation " in saying that, on that occasion, Sir George's mind was as " calm and clear as it could be, though he was very weak." Doctor Thorburn also testifies," during all this time I consider-

" ed Sir George's mind to be quite clear; " and Doctor De Couagne, in addition to his other testimony, says " that from " the morning of the 6th until shortly before death he was " perfectly conscious." The sum of all this testimony is that the intervals were really intervals of delirium or so alleged mental alienation, but transient and short duration; that, apart from the few hours of insensibility caused by the attack, and continued until towards the evening of the 1st of September, he was delirious from the afternoon of the 3rd until the morning daylight of the 4th, from the evening of the 4th until four o'clock in the morning of the 5th, and for a short interval in the afternoon of the 5th, and at all the intervening times until his death he was calm and conscious as well as rational. From all this it may be gathered that Sir George's normal state after his recovery from insensibility on the afternoon of the 1st was that of consciousness and reason, with the exceptions of those transient intervals of delirium or alienation above mentioned and that his state indicated not only his use of memory, understanding and will, but also plainly showed that he was not indifferent to his condition, inasmuch as from Doctor Sutherland's first intimation to him on the morning of the 3rd of the danger he was in he was duly impressed with the belief that he would not recover, and made every necessary preparation to meet his end, by settling his business matters, acknowledging his parting kindness and good will to his friends, and seeking the consolations of religion, throughout exhibiting the clearest appreciation of his state and of his danger. Against this mass of testimony is opposed the testimony of Doctor Sutherland, which, apart from the state of insensibility of the first day, really commences on the second and continues only to the morning of the 6th. He says that, on the morning of the 2nd, Sir George was to common observation better, and then referring to his demeanour and language during his visit of that morning, the witness gives two different descriptions in his evidence, as they appear in chief and in cross-examination: in the former, Sir George was *cheerful and gay*, which in the latter became *elation of manner and excitement of language;* in the former, he was *apparently indifferent as to his state*, in the latter this becomes *positive indifference he entertained of his state;* in the former *he declared he would be well the next day;* in the latter, *conceiving himself with fearful unreason not only better but absolutely well, and never expressing the slightest anxiety as to his recovery*. The differences between these two statements are manifest and need no comment, but to the latter is appended the opinion " that the circumstances were such that in a person of the manest correct apprehension, alarm or, at all events,

"anxiety would have been entertained." The witness did not remember that but a few hours previously he had directed Sir George's children to be informed that he was better, and that they need not come to him, and that himself says, Sir George to "common observation was better on that day," whilst it is not shewn that he had intimated to his patient the opinion he expressed, that Sir George would die of the attack; and yet, under such circumstances, the witness considers it *fearfully unreasonable* in Sir George not to exhibit alarm, or, at all events, anxiety. It is in this demeanour and language of Sir George this day that the witness finds symptoms of incipient alienation, and it is to these original symptoms that he refers in his subsequent daily testimony, *symptoms fully manifest and unequivocal*, and *aggravated*, and *yet worse*. Now were these references to the symptoms of the evidence in chief or of the cross-examination? On the afternoon of the 3rd the witness discovered hallucinations as present, which he asserts were "*spontaneous* and *constant* as well as *fixed* and *unequivocal* as *the desease advanced*, and *I would say intensified up to the last day which he was able to speak to me*." It would be an easy task to controvert this witness by the evidence adduced by appellants, and to prove that his memory of the circumstances has been erroneous. It is manifest that no hallucinations were present in Sir George's mind at the various times and conversations between himself and the witnesses for Respondent as above detailed, and they certainly were not present at the last conversation of the witness with Sir George on the 6th, when he says he had no conversation whatever with Sir George; it may be stated as very peculiar that these *spontaneous* and *constant, fixed* and *unequivocal hallucinations* were not noticed or observed upon even in the most distant manner by any of the witnesses of Respondent. Doctor Sutherland has also reported the alleged information of others which he has clothed in the strongest and most energetic expressions, such as *maniacal delirium*; Sir George had been *utterley unmanageable*, had *forcibly gone out of his room, not only delirious, but furious*; and, *if I remember right, had gone down stairs, &c.*; but there is nothing in the testimony of any of Respondent's witnesses to warrant its being intensified or energized into this very strong language. This evidence is not satisfactory, and cannot prevail against the array of proved facts established in evidence by Respondent, which go to prove the daily, almost hourly demeanour and language, the saying and doings, as it were, of Sir George from the evening of the 1st, when he was attacked, until the forenoon of the 7th when he died. Under these circumstances the merely medical opinion of Dr. Suther-

land against Sir George's sanity on the 4th and 6th, and as he says the whole period of his disease, cannot be permitted to prevail. He will not even allow that Sir George had or could have intervals of lucidity, although they were positively established by the witnesses, and positively asserted by Doctor DeCouagne, who adds : " in Sir George's case, there was " nothing in his disease after the morning of the fourth, when " the inflammation had commenced to subside to a certain extent, to prevent his having intervals of perfect lucidity ; " even although Doctor Sutherland himself admits in answer to the *question.*—" Do you believe that a medical man in cons- " tant attendance near Sir George could not distinguish and " ascertain lucid intervals between your visits ? " *Answer.*— " Most certainly such a person, had any such lucid intervals " existed, ought to have perceived, and doubtless did perceive " them." Now, as to merely medical testimony, the citation from 1 Bell's Comm., Bk. 2, part 2, c. 8, § 2, given by the Respondent's counsel, is very apt : " It has been well said that it " is scarcely possible to be too strongly impressed with the " great degree of caution necessary in examining the proof of " lucid interval. But the law does recognize as valid, acts " done during such an interval ; and this rule of law must not " be defeated by overstrained demands of the proof of the " fact. It may be observed in general, that the lucid interval " may be either in relation to time or to subject. 1st. If, in " point of time, there is proof of remission, or of intermission, " either periodical or at a particular date, including the inter- " val during which the deed was made, it is enough to sustain " the deed. There is no rule in law fixing any precise dura- " tion for a lucid interval, a week, a day, an hour. The point " truly for enquiry is, whether there was time sufficient for " the rational doing of the act in question ? 2nd. If the des- " cription of the malady be such that the person is insane on " particular topics only, and the act done, with all its associa- " tions, forms no insane topic, this will be enough. 3rd. In " either inquiry, the act itself and the manner of performing " it are of the first importance. If it be a rational act, ratio- " nally done without the guidance or control of another ; if " there be no delusion, no insane irritation or hallucination " inducing it ; if from the deed, or the manner, no indication " of frenzy or folly can be gathered, it will be sustained. " 4th. It is very important that facts, not opinions, shall be " relied on in matters of this sort. The opinions of calm and " skillful observers may be useful to guide the Jury ; but, " even from such persons, no opinion is of weight indepen- " dently of the fact on which it rests ; and to the evidence of " keepers, and of nurses and of the vulgar, who, with a care-

" lessness, or a prejudice, which overlooks all the necessary " discriminations, misinterprets every action of a person pro- " nounced to be insane, this observation requires to be very " vigilantly applied. 5th. Some difference of opinion has arisen " as to the strength of proof necessary in a case of lucid inter- " val considered relatively to the proof of the insanity to " which it forms an exception. Two great masters in jurispru- " dence have expressed opposite opinions on this question. " Lord Thurlow seems, in both cases, to have deemed it neces- " sary to have a proof as demonstrative of the lucid interval " as of the insanity, and of a restored strength of mind not " inferior to the original state of intellect of the person in " question. But Lord Eldon has well limited the doctrine; " since neither the same demonstration can be expected in " acts of rational calmness, as in the striking symptoms of " insanity; nor does the law require, in order to validate many " acts, the same perfect tone of intellect as while untouched " by disease; but is satisfied with a much less degree of capa- " city." This is the expression of common sense and reason, whatever Doctor Workman may opine as to the " depictions " and bloated caricatures of insanity made by writers," as he observes. Now, Doctor Workman, above mentioned, is the other witness produced by Appellant, and it is curious to note the differences and divergences between his testimony and that of Dr. Sutherland. Dr. Workman testifies as an expert upon cases of insanity, but, in this case only, upon portions of the testimony submitted to him for his opinion, and rests chiefly upon the very strong and energetic language of Dr. Sutherland; but he does not agree with the latter's description of the attack; he differs from him as to the diagnosis of the case and the mode of treatment, and declares that he is not prepared to affirm his concurrence in doctor Sutherland's *pathological view of Sir George's case as to the truly inflammatory character of the disease on the 2nd, 3rd and 4th days of illness.* Now Murray's check was made and given to him on the 3rd, and the other checks were made and signed on the morning of the 4th, and Dr. Workman, without being aware of these having been so made and without the evidence of those circumstances being submitted to him, refers to the making of the memorandum as follows: " The terms of the question " what are my last " bequests?" taken in conjunction with Dr. Thorburn's detail " of the transaction, suggest to me an antecedent fact which I " do not find stated in the evidence before me, yet, I consider " its existence of much value in ascertaining the mental con- " dition of Sir George at the time above referred to. It appears " to me obvious that Mr. Hopkins had knowledge of a prior " consideration of the bequests mentioned. Mr. Hopkins was

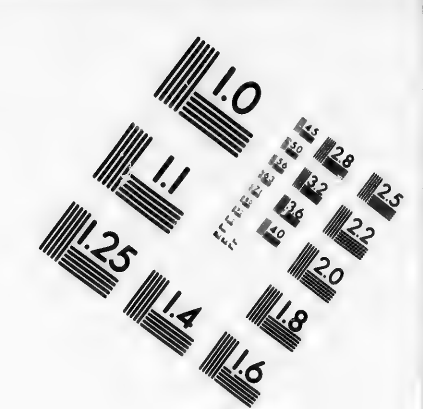
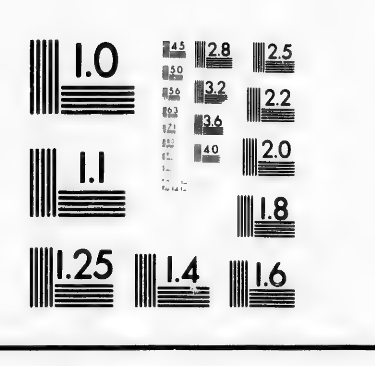


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" able to mention and to write down, or to call out the names " of the parties and the several amounts to be bestowedon them " without present dictation from Sir George ; it would then be " important to know the time at which the inception of those " bequests, or their previous discussions, took place. If their " consummation, on the evening of the sixth day, was the " carrying out of a purpose declared by Sir George before he " became insane, this fact might be regarded as *prima facie* " evidence of his present sanity ; but, if they stood connected " with an expression of purpose, or act, occurring after Sir " George became insane, then it would appear to me a fatal " morbid affinity existed." And we have seen that he would not affirm the truly inflammatory character of the disease on the 2nd, 3rd and 4th. Doctor Workman, upon another point of Dr. Sutherland's testimony, also differs with him even upon the partial testimony brought to his notice in the evidence of the latter witness, whilst the fact was that coma did not exist at all. After recurring to the evidence of doctor Sutherland, that he had left the patient in a comatose state on the 6th, doctor Workman says : " But, notwithstanding " this very unpromising condition, and, notwithstanding the " fact that doctor Sutherland's prognosis of death was next " day verified, the depositions of doctor DeCouagne and " doctor Thorburn establish the fact that the coma passed " off, and that Sir George became quite conscious, and so con- " tinued the whole day. Now I must confess that were I to " admit the accuracy of Dr. Sutherland's diagnosis of the case, " and regard it as primarily one of hemorrhagic apoplexy, and, " subsequently, of intense inflammation of the brain, I should " be unprepared to admit the statements of Dr. DeCouagne " and Dr. Thorburn as to Sir George's condition on the sixth " day after Dr. Sutherland took leave of him, in a state of " coma and apparently in *articulo mortis.* I have not found " that in post mortem examinations of patients similarly " affected, dying under my care, evidence of hemorrhagic " apoplexy has been afforded, unless in cases in which coma " proved persistent." It is questionable whether doctor Workman, with the full testimony submitted to him, would have ranked Sir George's case in the category of insanity. One thing he does believe that its *symtoms and phases* cannot be accounted for, except by withdrawing the case from the rank in which doctor Sutherland has placed it. Even if it could be said that the normal state of Sir George Simpson's mind was insanity, Respondent's evidence proves perfectly lucid intervals at the periods alleged to be insane, and the authority from Bell's commentaries above cited is thereon conclusive. To this add 5 Dalloz, vo. *Dispositions entrevifs,* Ch. 2, Sec. 2, art. 2,

p. 37 : " Les maladies du corps qui tourmentent presque tous " les hommes à leurs derniers moments ne sont une cause de " nullité de testament que quand elles occasionnent du trouble " dans les fonctions de l'intelligence. La peine d'une maladie " aigüe accompagnée de délire et de transport serait insuffi- " sante, si l'on ne justifie pas que le testament a été fait hors " des instants d'intermittence que peut admettre une pareille " affection." Sec. 5 : " L'individu non interdit étant toujours pré- " sumé sain d'esprit, la charge de prouver la démence retombe " sur ceux qui allèguent des faits de cette nature. Les légataires " ne seront pas désarmés en présence d'une enquête qui prou- " verait des accès de démence plus ou moins fréquents ; ils " pourraient opposer que le tout a été passé dans un intervalle " lucide, etc." See Furgole, des testaments, ch. 4, sec. 2, no. 208. Ricard, 1 part. ch. 3, sec. 3 et 155. " Mais c'est à eux, ceux qui " allèguent la démence, à faire la preuve etc." And 1 Ricard, p. 35 : " Et même d'avantage les lois ont voulu que, si la dé- " mence n'est pas continue, les testaments et autres actes qui " se trouvent faits pendant les bons intervalles, seraient " exécutés." It is scarcely necessary to test the sanity of the deceased by the reasonableness of the bequests. Sir George's fortune would surely permit, without cavil, of bequest in the whole amounting to about £4500, distributed amongst such legatees as those named by him. It may properly be added, that the testimony of Dr. Workman, built upon the energetic language of Dr. Sutherland, appears to be influenced by a feeling common to medical men having charge of that parti- cular class of disease, of constantly considering insanity as absolute and permanent. Little experience of human life teaches that human reason is subjected to numerous permanent or accidental alterations. Between a momentary trouble of mind or the state of torpor of intelligence and the complete loss of reason, there is a multitude of degrees and shades, which must be appreciated, and the influence of physical and moral causes must be determined which may prevent a man from being truly of sane mind. Doctor Workman and Dr. Sutherland, both from different grounds, adopt absolute and permanent insanity, *semel furiosus semper præsumitur furiosus*, but that is not the principle of law, " mais c'était plus qu'une fausse doctrine, " c'était une sorte de cruauté, et la doctrine de Mantico est " bien plus juste et plus humaine, lorsqu'il dit : *qui fuit " furiosus aliquo temporis momento, non ideo præsumitur " in posterum fuisse furiosus*, liv. 2, Prt. 5, no 7." The evi- dence of this expert in insanity, doctor Workman, cannot be held to influence this case in support of the plea, the more so as his evidence is met and contradicted in essentials by the medical testimony of two experienced professional men adduced

in his rebuttal. The plea of insanity has not been proved, and hence, therefore, the parting gifts or the dispositions and bequests of Sir George Simpson must be considered made whilst he was conscious and rational, and whilst his memory and understanding existed. Moreover, Demolombe, p. 367, lays it down, "lorsqu'il y a doute sur le point de savoir si le disposant était ou n'était pas sain d'esprit, le caractère de la disposition est à prendre en sérieuse considération : car on doit être plus porté à croire que le disposant était sain d'esprit lorsque la disposition est telle qu'un homme judicieux et équitable l'aurait faite et surtout aurait dû la faire." There is a fallacy in the Defendant's case : it does not really present a contestation as to acts done during intervals of sanity by a normally insane object, but the absolute converse, as to acts done by a sane subject, presumed by law to be such, and proved so by evidence, suffering, however, from acute malady, accompanied by intervals of delirium. It is proved most clearly that the bequest complained of was not made nor recognised during these latter intervals but at times of usual consciousness. Under all these circumstances, considering the facts adduced in evidence under a judicial, not a merely medical point of view, the plea of insanity has not been established, but on the contrary disproved, and the disposition in contest made by Sir George Simpson cannot be impugned.

MEREDITH, J. : I think that the cheque sued on, considering the circumstances under which it was made and approved of, may be regarded as a *donation à cause de mort*, or testamentary bequest, and, therefore, that the main question which we have to determine is this : Was the late Sir George Simpson of sound and disposing mind on the 4th September when he made, and, on the 6th of the same month, when he acknowledged and approved of the making of the cheques, the payment of one of which is sought to be enforced by the action now before us ? If the action of the Respondent had rested exclusively upon what took place, when the cheques were made, I am not prepared to say that it could have been maintained ; because it is certain that throughout the 4th of September, Sir George Simpson was subject, at intervals, to fits, which, for the time they lasted, deprived him of the use of his reason. Besides this, there were only two witnesses present at the making of the cheques, namely, Mr. Hopkins, the secretary of Sir George, and James Murray, his servant ; and, however deserving of credit these witnesses may be, we cannot but remember that they are deeply interested in the matter in controversy. But, when we turn our attention to the events of the 6th of September, that being the day upon which it is said Sir George confirmed the making of the

cheques, we find a body of evidence in favour of the pretensions of the Respondent to which it is difficult to refuse credit. In considering the evidence thus adduced, it is proper to bear in mind that there is no reason to suppose, and, indeed, it has not been suggested, that any attempt was made by those near Sir George Simpson to prevent his relatives or friends from having access to him during his sickness. On the contrary, Mr. Hopkins, upon the day of Sir George's attack, telegraphed to his son-in-law, Mr. Cameron, Cashier of the Bank of Toronto, in these words: "Sir George has "had a fit of apoplexy, his medical advisers think his case "serious." In the afternoon of the same day, by the advice of Dr. Sutherland, Mr. Hopkins again telegraphed to Mr. Cameron, saying: "Sir George is better, do not come down until "you hear further." But, on the afternoon of the 3rd, at the suggestion of the medical men, Mr. Hopkins sent a third message by telegraph, saying: "You had better come down with "Sir George's daughters, without delay, an unfavourable "change has taken place." Mr. and Mrs. Cameron and the two Misses Simpson arrived on the morning of the 4th. On that or the following day, Mr. Cameron telegraphed for Dr. Thorburn of Toronto, whose wife was a grand-daughter of Sir George Simpson: and, on the morning of the 6th, at nine o'clock, Dr. Thorburn arrived at Sir George Simpson's house. I now come to the consideration of the evidence bearing on the facts alleged to have taken place on the 6th of September, and I advert to it particularly, because it is mainly upon those facts that I base my judgment. On the morning of that day, Sir George Simpson was visited for the last time by Dr. Sutherland. The evidence of the witness last named, not only from his high professional standing, but also from the fact of his having been the consulting physician on the occasion in question, must necessarily have great weight in this cause. Dr. Sutherland says: "On the sixth, I visited Sir George for "the last time, and found him in a state of coma. He had "had during the night involuntary evacuations, as evidenced "by what I saw in the bed; he was evidently sinking fast, "and that opinion I expressed unhesitatingly to those in the "room, even though one gentleman strongly expressed his "opinion to the contrary, and this opinion of the rapidly approaching decease I reported next morning to his own physician, Dr. Campbell, who had just arrived from Cacouna, "informing Doctor C. that he need not be in a hurry to go "out to Lachine, inasmuch as Sir George would be either *in* "*articulo mortis*, or absolutely dead before he could reach "Lachine." And, in his cross-examination, the same witness says: "On the morning of the sixth, I had no conversation

" whatever with Sir George, for he was in a state of coma, " which is that of utter stupor." Sir George, according to the evidence of the other witnesses, cannot have remained long in the state described by Dr. Sutherland. For, about an hour or an hour and a half after he left, Dr. Thorburn of Toronto, who had been telegraphed for as already mentioned, arrived. This witness, who, it is to be recollected, was married to Sir George's grand-daughter, describes his reception by Sir George as follows: When I arrived, on the morning of the sixth, he said: " My dear boy, I am glad to see you, when did you " come down ? " and then enquired after my wife and children, and made the remark, " You find me very low." During the day, I was in attendance upon him, and along with Dr. DeCouagne administered remedies to him; he always required to know why and wherefore medicines were given him, before taking them ; his sense of hearing was very acute, and if any one came into the room, he would ask who came, and if any remarks were made, he would enquire what they were, and repeat the question until answered. M. Cameron, M. McKenzie and M. Hopkins give the substance of, or refer to conversations in which Sir George Simpson took part that day, and the testimony of Mrs. Cameron, as to the matter in which the making of the cheques was ratified by Sir George Simpson, is as follows: " On the evening of " Wednesday, he " became quite calm, and passed a quiet night; he seemed to " know us quite well, but did not speak much; we did not " try to induce him to speak, prefering that he should rest, " but when he did speak, it was sensibly. On Thursday " morning, he was quite clear and remained so, sleeping a " good deal during the day; I was in his room nearly all " day and all evening. Between eight and ten o'clock, my " two sisters, myself, Mr. Cameron and James Murray were " in the room with Drs. Thorburn and DeCouagne, when my " father asked for M. Hopkins who had just come into the " house from his own; he seemed to be impatient for him to " come, and repeatedly asked for him. M. Hopkins came soon, " and asked him what he wanted him for; he told M. Hop" kins to get pen, ink and paper, and write down his last " bequests. I think M. Hopkins brought the pen and ink into " the room with him, having gone out for the purpose of get" ting them. M. Hopkins asked him if he meant the cheques " he had signed a few days before, to which he answered, " " Yes." M. Hopkins wrote down a memorandum of the " names and sums of money; M. Hopkins then read out the " first name and sum of money, and asked him if it was cor" rect, he replied: " Yes, go on." M. Hopkins then read out " each name and sum, and asked particularly after each if it

" was correct, to which he always answered much in the same
" way, " Yes," or " Certainly," generally adding, " go on."
" I am not certain whether M. Hopkins read out each name
" as he wrote it down or wrote them all down, and then went
" over each separately, but each name was read to my father
" separately with a question as to its correctness, and he ex-
" pressed his approval of each. When they were all written
" down and read over, M. Hopkins asked him if it was his
" wish that those amounts should be paid to the persons
" named, and he replied distinctly that it was. I remember
" that he enquired what the whole came to, and M. Hopkins
" told him, when he said " all right," or " exactly," or some
" words to that effect, and seemed quite satisfied; his mind
" seemed more at ease when this was over. I afterwards
" signed the memorandum which M. Hopkins had made, and
" read to him, I think immediately after my father's death.
" When this memorandum was made, my father was quite
" sensible and able to do any business of the sort." The same
facts are testified to by M. Hopkins, Sir George's secretary, as
follows: " On the morning of the sixth, the paroxysms had
" ceased, but his strength had evidently been much reduced,
" but his mind was quite clear, so that he was enabled to con-
" verse in a collected manner with those about him. On the
" evening of that day, between seven and eight o'clock, on
" returning from my own house, where I had been for a couple
" of hours, I was told Sir George wished to see me, in order
" to dispose of a matter of business which he had on his mind.
" I found in his bedroom assembled, M. and Mrs. McKenzie,
" M. and Mrs. Cameron, the two Misses Simpson, Dr. Thor-
" burn, Dr. DeCouagne, the Rev. M. Simpson, and James Mur-
" ray. As I entered the room, Sir George said: " Has Hopkins
" come?" I went to his side and said: Here I am, Sir George
" have you anything particular to say to me? he replied:
" " Yes, I wish you to take a memorandum of my last be-
" quests." As I did not exactly understand him, he said in
" explanation: " Get pen, ink and paper, quickly, and make a
" memorandum of my wishes, as I have no time to lose." Ha-
" ving provided myself with writing materials, I sat down on
" the bedside, and stated I was ready. Sir George then said to
" me: " Now put down what I have been doing—the bequests
" I have made;" I said, " Do you refer to the cheques you
" drew the other day?" he replied, " Certainly, now put them
" down, what are they?" Seeing present several persons who
" were interested, I felt a delicacy about proceeding, and mo-
" tioned to M. Simpson to leave the room, when he and M.
" and Mrs. McKenzie left the room; the two doctors were
" going backwards and forwards between the bed-room and

" dressing-room, the door between the two being wide open.
" The delay seemed to make Sir George impatient, and he
" said : " Go on, go on, why do you keep me so long ?" I there
" upon made a list of the six cheques, and said : " Here is a
" memorandum of the cheques, shall I read them over to
" you ?" On his replying in the affirmative, I commenced as
" follows : " Angus Cameron, five thousand dollars, is it your
" wish that that sum should be paid him ?" Sir George replied,
" " Yes, certainly, go on, why do you tease me by delay ?"
" Either M. Cameron or Miss Margaret Simpson, or both, who
" were sitting close to their father's head, repeated my ques-
" tion, to which he again replied, " Yes, what next ?" I went
" on reading, " Hector McKenzie, five thousand dollars, do
" you wish him to receive that sum ?" Sir George replied :
" " Yes, what next ?" Somedy repeated my question, when
" he said : " Certainly, go on." In this way, I read out the
" other names and amounts as follows : " E. M. Hopkins, five
" thousand dollars ; the Rev. J. Flanagan, one thousand dol-
" lars ; the Rev. William Simpson, one thousand dollars ;
" James Murray, twelve hundred dollars" ; after reading each
" bequest, I formally asked Sir George, if that was his wish,
" and if he wished the parties to receive the sums which fol-
" lowed their names ; my questions were repeated by others
" around the bed, and on every occasion Sir George replied,
" "Yes," or " Certainly, go on, what next ?" After having
" gone over the list, *seriatim*, I said, " Sir George, am I to un-
" derstand that these are your last wishes, and that it is your
" desire I should make these payments ?" He asked me the
" amount of the whole : I replied, eighteen thousand two
" hundred dollars, when he said, distinctly, " Yes, certainly ;"
" M. Cameron and his daughters asked him if I had properly
" understood him, and had done all he wished, to which he
" invariably replied, " Yes." From that time (about nine in
" the evening of the sixth) his mind appeared more at ease,
" and though I remained with him till he died, about eleven
" o'clock next day, he never once adverted to any matter of
" business. The memorandum I prepared on that occasion,
" I signed on the spot, and also got it signed by Mr. and Mrs.
" Cameron, James Murray, and Miss Margaret Simpson, as
" soon as I had an opportunity of so doing. Dr. Thorburn added,
" on the back, his certificate of Sir George's state of mind,
" within an hour after Sir George's death. On the evening of
" the sixth, before the making of the memorandum I have
" described, I had asked Dr. DeCouagne for a special report
" on Sir George's condition, my principal object in so doing
" being to put myself in a position to report to the company
" in London, by next day's (Friday's) mail. In the memo-

" randum, I have said the cheques were drawn on the fifth of " September: this was an error, attributable to the confusion " and excitement of the moment; the cheques referred to were " drawn, Murray's on the third, and the others on the fourth, " as I have stated before. I had been so long acquainted with " Sir George Simpson, that no person could be more familiar " with his manner and his mode of thought than I, and I could " judge, as well as any one, physician or friend if his mind " was collected and in his usual state. Upon both the fourth " and the sixth, on the occasions I have described, namely, " the signing of the cheques and the dictating of the memo- " randum, I have not the least doubt, and can say positively, " that his mind was calm and sound, and that he was in full " possession of his mental faculties." The testimony of the Rev. Mr. Simpson, who upon the occasion in question, was present in the discharge of his duty as a clergyman, is a follows: " The next time I saw him was on the evening " of the sixth, when I was again sent for to come the " house, as he wished to see me. When I came to his bed-room " I found Mr. and Mrs. Cameron and two Misses Simpson " and Dr. Thorburn in the room; the servant Murray was " going about the room doing different things. When I went " in I enquired how he felt: I observed that he looked much " weaker; he told me that he was weaker. I then prayed, and, " afterwards, Sir George called for Mr. Hopkins, who came in " and went up to the bed to speak to him. Mr. Hopkins asked " him what he wanted with him, when Sir George replied " that he wanted him to take a memorandum of the bequests " he had made; he seemed very earnest that no time should " be lost, and Mr. Hopkins said to me it might be as well if I " would leave the room as there might be some private affairs " to be gone into; and I accordingly went into the dressing- " room, opening off the bed-room: Dr. DeCouagne was in the " room when I went in, and Dr. Thorburn afterwards came " in: Murray remained in the bed room all the time. From " what Mr. Hopkins had said, I did not like to listen, and " therefore did not hear what was going on in Sir George's " room. I did not return to the bed-room. I have not the least " hesitation in saying that, on that occasion, Sir George's " mind was as calm and clear as it could be, though he was very " weak." The evidence of Mr. Cameron, Mr. McKenzie, and of the servant man, Murray, agrees with that of Mr. Hopkins, Mrs. Cameron and the Rev. Mr. Simpson, as to the confirmation of the cheques. These witnesses, although not in law incompetent are deeply interested in the question, respecting which they have given their testimony, and, therefore, however respectable they may be, their evidence must be read

with great caution. But, at the same time, it must be borne in mind as a point of very great importance, that the evidence of the interested witnesses is quite in harmony with that of Dr. Thorburn and of Dr. DeCouagne, who are perfectly disinterested. The evidence of Dr. Thorburn has been already adverted to, and Dr. DeCouagne, who attended Sir George Simpson during the whole of his last sickness, says: "On the "sixth, before leaving the room when his family came in, I "had been examining him particularly, and found him per- "fectly rational; he conversed with some ease. The reason I "examined him was, I had just been to supper, and Mr. Hop- "kins, on return from my own house, asked me to go in to "see Sir George, and report very particularly to him (Mr. Hop- "kins) in what state I found him, that was about two minutes "before I made the examination, which took about five mi- "nutes, and I then immediately left the room as before stated." Here, it may not be out of place to remark that the witnesses by whom Sir George was surrounded during his dying hours were not in any respect intruders; on the contrary, they may be said to have been persons of his own choice, each of whom was bound to be present on that solemn occasion by the ties, either of nature, friendship, or of duty. They were his three daughters, his son-in-law and the husband of his grand-daughter, his friend who had lived with him for the two years preceding his death, a gentleman who had been his private secretary fore more than twenty years, his servant who had lived with him for six years, and, in fine, one of the physicians and the clergyman who had attended him during his last sickness. And, unless we can believe that all these persons were either deceived themselves or have attempted to deceive us as to the state of Sir George's mental faculties on the occasion of which they speak, we must regard him as having been then of sound and disposing mind. I therefore think the Respondent must be deemed to have made out his case, unless indeed the medical evidence be sufficient to prove that it was impossible that Sir George could then have been of sound and disposing mind. Such it appears is the opinion entertained by Dr. Sutherland, the consulting physician who attended Sir George during his last sickness. And the opinion of this witness is fully borne out by the evidence of Dr. Workman, superintendent of the lunatic asylum at Toronto, who occupies a very high position in that branch of the medical profession to which he has specially devoted his attention. I do not propose to refer to the symptoms of insanity or to the hallucinations spoken of by Dr. Sutherland, because it is admitted that Sir George Simpson, at different times, during his last sickness, was completely delirious. But the question

is not as to whether the mind of Sir George wandered *at any time* during his last sickness, but as to what his mental condition was when he made and afterwards ratified the cheques in question. I therefore content myself with giving the opinion of Dr. Sutherland as to the point under consideration, which is as follows : " In my opinion, there could have been no state of per- " fect lucidity in Sir George's case from the time the inflamma- " tion of the brain manifested itself until the time of his death ; " and in answer to the question : " If you had remained constan- " tly with Sir George, and found him, after your second visit, " speaking rationally, and, also, on the second day and third " day indicating after ten o'clock in the morning unmistakeable " signs of intellect, would you have believed him notwith- " standing unsound of mind and not enjoying at these mo- " ments the use of his faculties ? " Dr. Sutherland says : " Most " assuredly I would have conceived him of unsound mind " throughout those two days and the whole period of his " disease : I have already stated that the glimpses of seeming " reason were fitful, transient, and, if relied on, fallacious, and " affording no testimony in the slightest degree approaching " to sanity." The opinion of Dr. Workman is given in the following emphatic terms : " The evidence of Sir George's insa- " nity, from the first day up to the morning of the 6th day, is " to my mind entirely convincing, nor could any amount of tes- " timony showing that *at intervals* Sir George was free from " delusion or hallucinations satisfy me that his insanity was " absent on such occasions." And, in another part of his deposition, the witness says : " Dr. Sutherland's theory of Sir " George's mental condition, in so far as it presents the case " as one of incurable insanity, and, from its connection with " fatal disease of the brain, incapable of reliable lucid inter- " mission, coincides exactly with my own views of Sir George's " state of mind throughout his last illness." It is necessary, however, to observe that, although Dr. Sutherland and Dr. Workman agree as to the impossibility of there having been any lucid interval in Sir George's case, yet, that as to some points they seem to differ. For instance, Dr. Sutherland says : *Answer :* " In Sir George's case, the mental phe- " nomena may be divided into two phases : the one directly " caused by the laceration of the substance of the brain, " occurring at the time of the attack ; the second period or " phase occurring as the consequence of the inflammation " caused by that laceration. In the first of these states or " phases the absence of consciousness is absolute and total : " in the second, the effect on the mind is gradual and progres- " sive, and proportional to the changes going on in the brain itself ; such change involving softening, the possible forma-

" tion of pus and serous effusion, according to the duration of " the disease." As to this point Dr. Workman has said : " I do " not believe the hallucinations resulted from laceration of " the brain ; for this is a morbid lesion which I have very " seldom realized in *post mortem* examinations of the brains of " persons who had been affected similarly to Sir George " Simpson, and, in those cases in which I have realized it, the symptoms were different from those of Sir George's case. " Indeed it is my opinion that laceration of the brain with " consequent necessary effusion of the blood would have pre- " cluded the possibility of hallucination or any other form of " mental activity. Such at least has been my own observation." In another part of his deposition, Dr. Workman observes : " I " am not prepared to affirm my concurrence in the pathologi- " cal view of Sir Georg'es case expressed by Dr Sutherland " and Dr. DeCouagne as to the truly inflammatory character " of the disease of the brain, on the second, third, and fourth " days of illness ; and yet I have no other designation to offer " unless I should call it a *quasi* or *pseudo* inflammation just " as I should, I think, have termed both Sir George's attacks " of apoplexy, *pseudo* or *quasi* apoplexy." Dr. Workman also says : " I believe that only by withdrawing Sir George's case " from the rank in which Dr. Sutherland has placed it, and " installing it in the category of insanity, can all its symptoms " and phases be accounted for." And when we turn to the evidence of Dr. Macdonnell, a physician also enjoying a very high and widely extended reputation, we find that he gives his opinion of the case as follows : " I consider that Sir George " Simpson died from *anœmia* or bloodless condition of the " brain, causing a commencing softening of the brain which " would have ended in the formation of abscess or purulent " infiltration of the brain ; I do not think that there was acute " inflammation of the brain on the third, fourth or fifth days " of September ; I do not consider that he died from inflam- " mation of the brain, but that he died rather from exhaustion " of the nervous system caused by the *anœmic* or bloodless " condition of the brain ; the delirium, as described by the " attending physicians, is consistent with the physical condi- " tion of Sir George that I have described." And in another part of his evidence he gives his opinion as to the point now particularly under consideration in answer to the following question : " In view, then, of the facts stated in the deposi- " tions of the medical men before referred to, do you believe " it possible that, on the occasions when Drs. Thorburn and " DeCouagne state that Sir George Simpson enjoyed intervals " of perfect lucidity, he should not have been in full posses- " sion of his mental faculties ?" *Answer.* " It is my opinion

"he must have been in full possession of his mental faculties on those occasions." The evidence of this witness, it will be recollected, is supported by that of Dr. Decouagne, whose examination-in-chief closed with these words: "In Sir George's case, there was nothing in his disease, after the morning of the fourth, when the inflammation had commenced to subside to a certain extent, to prevent his having intervals of perfect lucidity." Seeing then the embarrassing conflict which the medical evidence in this case presents, it appears to me impossible for us to make it the basis of our judgment, and, therefore, that we must form our own opinion as to the sanity of Sir George Simpson, upon the occasion in question, mainly from the facts of the case as established in evidence; and viewing the case in this light, after going over the whole of the evidence with much care, I am of opinion that the judgment of the Court below is right. At the same time I think that the circumstances of the case were such as to make it the duty of Appellants to bring the matter under the consideration of the court. The investigation that has taken place has established these two points at least: 1st. That whatever may have been the mental condition of Sir George Simpson when he made the legacies impugned, they were, at any rate, the spontaneous dictates of his own mind, and are not in any degree attributable to the suggestions and artifices of others; and, secondly, that we cannot annul those legacies unless we are prepared to adopt the opinion of Dr. Workman, that the case of Sir George Simpson was one of "incurable insanity." This would be a painful conclusion to arrive at, and as it is one which I do not think the evidence sufficient to establish, I concur in confirming the judgment of the Court below.

MONDELET, J. The question will, I think, reduce itself to this: When Sir George Simpson signed the cheque in favor of the respondent, on the 4th September, 1860, was he sufficiently *compos mentis* to do it *en connaissance de cause.* I have attentively read the evidence, and, after reflection, have come to the conclusion that he was. Dr. Workman's dissertation may in itself be very scientific, but it applies specially to lunatics. Dr. Tuson's illustration of cases and Dr. Macdonnell's practical truths, connected with the evidence of Dr. DeCouagne, Hopkins, and others, speak more to the case than all the rest. Dr. Sutherland's opinion is also more of a theory than grounded upon all the continuous facts. As to the *don manuel,* it is legal. Whether Hopkins was or was not the agent of Sir George Simpson or of the Respondent, or of both, is indifferent. The cheque was given on the fourth September for the Respondent, it became his property, and by his action he

claims it as such. I need not here enter into a metaphysical or physiological dissertation on the mind and its operations. I am for confirming the judgment.

JUDGMENT IN APPEAL : " Considering that the late Sir George Simpson, at the time of his making and signing the check, the subject matter of contestation in this cause, in favor of and payable to Respondent, Plaintiff below, for the sum of $1000, to wit, on the fourth day of September, 1860, and at the time of his, Sir George's Simpson's subsequent acknowledgement and recognition of the check, to wit, on the 6th day of September, 1860, was of sound mind and understanding: and considering that, in the disposition aforesaid, by Sir George Simpson of the said sum of money in and by the check, the same was a legacy and bequest made by Sir George Simpson to and in favor of Respondent: Considering that, in the judgment of the Superior Court for Lower Canada, sitting at the city of Montreal, in the district of Montreal on the 26th day of September, 1862, adjudging and condemning Appellants, to pay and satisfy to Respondent, the said sum of $1000, there is no error, doth, for the considerations aforesaid, affirm the said judgment, with costs to Respondent against the said Appellants." (14 *D. T. B. C*., p. 328, et 8 *J*., p. 225.)

BETHUNE, for Appellants.

SNOWDONN and GAIRDNER, for Respondent.

LAFLAMME, R., and TORRANCE, F. W., counsel for Respondent.

VENTE.—GARANTIE.—CRAINTE DE TROUBLE.

BANC DE LA REINE, EN APPEL, Montréal, 1 mars, 1864.

Présents: DUVAL, MEREDITH, MONDELET et BADGLEY, Juges.

MONJEAU, Appelant, *et* DUBUC, Intimée.

Jugé : Que l'acquéreur d'un immeuble, dont une moitié n'était possédée par le vendeur qu'à titre d'usufruit, peut refuser d'en payer le prix, et peut demander la résiliation de la vente, s'il est menacé d'éviction, sans être tenu d'accepter les cautions offertes par le vendeur. (1)

L'Appelant, par acte du 4 septembre, 1861, devant notaires, vendit à l'Intimé un terrain qu'il déclara lui appartenir, pour l'avoir acquis du shérif, le 19 octobre, 1858, pour le prix de $700. Cet immeuble avait été adjugé à l'Appelant, le 15 juin, 1858, du vivant de Sophie Daigneau, épouse de l'Appelant, avec laquelle il était commun en biens, et qui était ensuite décédée le 7 septembre, avant le jour auquel l'Appelant obtint

(1) V. art. 1535, C. C.

du shérif le titre de l'immeuble qu'il avait ainsi acheté. Sophie Daigneau, par son testament, avait donné à l'Appelant l'usufruit de ses biens, et la propriété à des neveux et nièces. Plus tard, l'Intimée, informée de l'état des choses, signifia à l'Appelant qu'appréhendant d'être troublée par les légataires à la propriété, elle n'entendait pas donner suite au contrat, et lui déclara son intention de résilier la vente. L'Appelant lui offrit alors une caution qui s'obligerait, avec hypothèque spéciale au montant de $800; l'Appelant offrant en sus d'hypothéquer un autre immeuble à lui appartenant, jusqu'au montant de $500. L'Intimée ne fut pas satisfaite des cautions offertes, et l'Appelant porta son action pour le recouvrement du prix, alléguant dans sa demande, et le protêt de l'Intimée, et les offres de cautionnement qu'il avait faites. Par ses défenses, l'Intimée allégua le dol de l'Appelant, et la déception à laquelle elle fut soumise par les représentations de l'Appelant, en se donnant comme véritable propriétaire de l'immeuble; l'insuffisance des cautionnements offerts, et son droit de demander la résiliation; elle établissait que l'immeuble en question était un conquêt de la communauté entre l'Appelant et Sophie Daigneau, et que l'Appelant n'était propriétaire que pour moitié, n'ayant l'autre moitié qu'à titre d'usufruit, et non de substitution, en vertu du testament de Sophie Daigneau. Elle offrait, de plus, et consigna le montant réclamé, et les intérêts de deux ans aux conditions suivantes: 1o. que le Demandeur ferait, sous 15 jours du jugement à intervenir, cesser le trouble en question, et donnerait à la Défenderesse cautions solvables, à sa satisfaction; que chacune hypothèquerait des biens fonds francs et quittes de toutes dettes et hypothèques quelconques, et ce jusqu'au montant de 2,000 piastres, et qui s'obligeraient solidairement de faire en sorte que la Défenderesse, ses hoirs et ayants cause, ne seraient, à l'avenir, troublés, inquiétés ou évincés du dit immeuble ainsi par elle acquis du Demandeur, ou d'aucune partie d'icelui, soit par les dits neveux et nièces de Sophie Daigneau, leurs hoirs et ayants cause, par les créanciers hypothécaires ou autres, et ce, à peine de tous dépens, dommages ou intérêts que la Demanderesse pourrait souffrir, pour quelque cause que ce pût être, (y compris le remboursement du prix de vente, en capital et intérêts échus et à échoir) par rapport à la vente en question, et, à défaut par le Demandeur de ce faire, dans le délai susdit, elle concluait à ce qu'il fût forclos de ce faire, et, qu'alors et dans ce cas, l'acte de vente ainsi fait par le Demandeur à la Défenderesse, le 4 septembre, 1861, fût déclaré nul et résolu pour toutes fins que de droit, et, en conséquence, la Défenderesse déchargée de payer au Demandeur le prix de vente en capital et intérêts échus et à échoir, et que les offres ainsi faites au Demandeur par la

Défenderesse de lui payer la somme de 707 piastres, et, de plus, celle de 12 piastres, pour intérêts depuis le 29 octobre, 1861 au 8 février, 1862, ainsi que la consignation d'icelles devant cette Cour, fussent déclarées comme non faites, nulles et de nul effet, et comme non avenues, et que la Défenderesse avait droit de retirer ce dépôt, et enfin l'action du Demandeur renvoyée, avec dépens, et, dans tous les cas, la Défenderesse concluait au débouté de cette action quant au surplus de la somme ainsi consignée. Ces défenses furent produites le 8 février, 1862, et le dépôt de 719 piastres aussi fait ce jour-là. Le 18 février, 1863, la Cour Supérieure, à Montréal, rendit le jugement qui suit : (M. le juge assistant MONK siégeant.) " La Cour, considérant qu'il résulte de la preuve produite, que, le 15 juillet, 1858, le Demandeur est devenu adjudicataire et propriétaire, en vertu d'une vente par le shérif du district de Montréal, de l'immeuble décrit en la déclaration du Demandeur, et par lui vendu à la Défenderesse, par acte de vente en date du 4 septembre, 1861 ; considérant qu'il est établi qu'au temps de la vente et adjudication par le shérif, il existait communauté de biens entre le Demandeur et son épouse, Sophie Daigneau, partant que le dit immeuble est tombé dans la communauté de biens, et en est devenu un conquêt immeuble ; considérant, d'abondant, qu'il n'est pas prouvé quand et à quelle époque le Demandeur a payé au shérif le prix de vente du dit immeuble ; considérant qu'au temps du décès de Sophie Daigneau, ci-après mentionnée, la moitié *indivise* du dit immeuble appartenait à Sophie Daigneau, et l'autre moitié indivise au Demandeur : Considérant que, par son testament solennel, reçu devant E. Pages, notaire public, et témoins, en date du deux septembre, 1858, Sophie Daigneau, alors épouse du Demandeur, entr'autres legs, a légué au Demandeur, son époux, l'usufruit de ses immeubles, et entr'autres, de la moitié indivise de l'immeuble en question, sa vie durante, et la propriété de ses immeubles à ses neveux et ses nièces ; vu que Sophie Daigneau est décédée le sept septembre, 1858, sans avoir révoqué ou changé son testament, et que, comme commune en biens avec le Demandeur, son époux, elle était, à l'époque de son décès, propriétaire, comme susdit, de la moitié indivise de l'immeuble en question Considérant qu'au temps de la vente de l'immeuble en question, le quatre septembre, 1861, le Demandeur n'était propriétaire que de la moitié indivise du dit immeuble, et que de l'autre moitié indivise il n'était que l'usufruitier, en vertu du testament de Sophie Daigneau, sa défunte épouse. Considérant qu'au temps de la vente en dernier lieu mentionnée, le Demandeur n'avait aucun droit de vendre la moitié indivise de l'immeuble dont il avait seulement la jouissance sa vie durante comme usufruitier : Considérant que, d'après nos lois

et la preuve produite, la dite vente du quatre septembre, 1861, est nulle quant à la dite moitié indivise de l'immeuble en question. Vu le refus de la Défenderesse d'accepter la vente du quatre septembre, 1861, pour l'autre moitié indivise du dit immeuble appartenant au Demandeur, sans avoir la totalité de l'immeuble ainsi vendu par le Demandeur et par elle acheté; lequel refus, vu la preuve produite, est légal et pleinement justifiable, et aussi la requisition et la demande par elle faite au Demandeur en date du sept octobre, 1861, de résilier le dit acte de vente du quatre septembre, 1861, déclare la vente du quatre septembre, 1861, nulle et comme non avenue entre les parties. Considérant qu'il appert par la preuve que les légataires universels en propriété des immeubles délaissés par Sophie Daigneau, ou plusieurs d'entre eux, ont formellement signifié, tant au Demandeur qu'à la Défenderesse, leur intention de faire déclarer quant à eux la nullité de la vente du quatre septembre, 1861 ; aussi de se mettre en possession de leurs parts respectives du dit immeuble au désir du testament de Sophie Daigneau, et qu'ils feront tous autres procédés qu'ils jugeront nécessaires, aux fins susdites : Considérant que, dans les circonstances telles que ci-dessus exposées et relatées, le Demandeur n'est pas fondé en droit de réclamer de la Défenderesse aucune partie du prix de vente, comme il l'a fait par la présente demande, en offrant caution que la Défenderesse ne sera jamais troublée ni inquiétée en la possession, jouissance et propriété du dit immeuble, maintient l'exception ou fin de non recevoir en premier lieu plaidée par la Défenderesse, annulle l'acte de vente du quatre septembre, 1861, à toutes fins que de droit, en sa totalité, tant pour la moitié indivise du Demandeur que pour la moitié indivise afférente aux dits légataires universels en propriété de Sophie Daigneau, et a débouté et déboute l'action du Demandeur, avec dépens."

De ce jugement il fut interjeté appel, l'Appelant soutenant que l'Intimée n'avait pas droit de demander la résiliation, mais seulement cautions, et que les cautions qu'il avait offertes étaient suffisantes. (1)

DUVAL, Justice ; The Plaintiff brought his action for a *prix de vente ;* the Defendant pleaded that Plaintiff, at the time of the sale, was only owner of one half of the property sold, the other half belonging to the community between the vendor

(1) Autorités citées par l'Appelant : 2 Henrys, liv. 4, c. 6, pp. 317, 318 ; 2 Catelan, liv. 5, c. 42, pp. 301-2 ; Pothier, *Vente*, art. 4, No. 48, pp. 478 et suivantes ; 14 Toullier, No. 239 ; Troplong, *Vente*, No. 250 et suiv.

Autorités citées par l'Intimée : Nouv. Den., vbo. *Adjudication*, p. 233, § 32, No. 5 ; 5 Cochin, p. 656 : Pothier, *Vente*, Nos. 7, 48 ; Troplong, *Vente*, pp. 1 à 4, et 12, 13 ; 1 Bourjon, p. 413 ; Code Civ., art. 1599 ; Code de la Louisiane, 2427 ; Troplong, *Vente*, Nos. 230-1-6 ; 6 Marcadé, p. 208.

and his late wife. The question at issue is whether the purchaser can, before eviction, raise this question, and refuse to pay the balance of the *prix de vente*, whilst he is in possession. Pothier, in his *Traité de vente*, speaks of the sale as transmitting rather the possession than the property of the thing sold; although, in his *Traité de louage*, he does not say the same thing, but the reverse. We find in 3 Champ. and Rig., p. 1741, an epitome of the old law on the point. (1) It is clear in this case that the vendor knew, at the time of the sale, that he was proprietor only of one half of the property sold. I consider this decisive of the case. The vendor who sells knowing he is not proprietor, may be met with a plea such as has been filed in this cause. (2) The property has been paid for after the dissolution of community, therefore Plaintiff pretended it was a *propre*, but the court will look to the date of the contract to determine whether or not the property fell into the community, and, for my part, I am satisfied that the property in question did belong to the community. It may be added that, according to the forms most frequently used by notaries here, it was the *fonds* itself that was conveyed, and not merely the possession. Both Marcadé and Troplong hold that this form of deed may be validly adopted. There is nothing *contrà bonos mores* in a stipulation that the property itself shall be transferred to the purchaser. But, at all events, without basing the judgment upon this, the court here holds that, in this case, the knowledge of the vendor that he was not proprietor is conclusive against him. He cannot collect the full price whilst only selling half the property, selling it knowingly for the whole.

MONDELET, Juge : Le jugement dont est appel est, à mon avis, aussi exact qu'il est bien clairement motivé. L'immeuble que l'Appelant a, le 4 septembre, 1861, vendu à la Défenderesse, était, lors de son acquisition par l'Appelant, du shérif, Boston, le 19 octobre, 1858, (comme le déclare l'Appelant lui-même) tombé dans la communauté alors existant entre lui et Sophie Daigneau, son épouse, qui vivait alors. L'Appelant n'avait dans ce conquet de communauté, par conséquent, qu'une moitié. Or, par le testament de sa femme, il n'est qu'usufruitier et non le propriétaire de la moitié de cette dernière. N'ayant donc aucun droit de vendre tout l'immeuble, et l'ayant fait, sachant qu'il vendait une moitié dont il n'était aucunement propriétaire, il n'a aucun droit d'en réclamer le prix. Au contraire, la Défenderesse qui est bien fondée à ne pas accepter

(1) Pothier, *Vente*, Nos. 154, 239 : 1 Berthelot, *Evictions*, p. 473.

(2) Pothier, *Vente*, Nos. 154, 239, to which a great number of authorities might be added, tracing the doctrine to the Roman Law.

la moitié de cet immeuble, et qui a dûment interpellé le Demandeur de lui livrer le tout, au lieu de partie de l'héritage, demande, avec raison, que la vente soit déclarée nulle. Il est incertain *quand* l'appelant a payé au shérif le prix d'adjudication, et cela aussi *incertain* qu'il est établi qu'il a acquis le 19 octobre, 1859. L'action a été bien et dûment déboutée, et je ne vois aucune difficulté à dire que le jugement dont est appel doit être confirmé.

MEREDITH, Justice : Our Courts have frequently held (1) that a person purchasing real estate has not a right to have the sale set aside merely on the ground that the vendor was not, at the time of the sale, the owner of the property sold ; but this doctrine, as is plain even from the authorities cited by appellant, is not applicable to a case where the vendor, knowing that he is not the proprietor of the thing sold, withholds that knowledge from the purchaser. A person purchasing real estate is supposed to have in view the interests of his family ; and no prudent man would wish to leave in his succession, instead of real estate held by a good title, property likely to be the cause of a number of law suits. In the present case, Appellant, it is admitted, is owner of one half only of the real estate which he sold. All the facts which prevented him from having the ownership of the other half of the property, and which caused it to be vested in others were within his knowledge ; and I therefore think that he must in law be presumed to have known that he was selling property not belonging to him. The conduct of Appellant after the sale strengthens this presumption. The sale took place on the 4th September, 1861. Soon afterwards, Respondent ascertained that one half of the real estate purchased belonged to several proprietors ; six of whom duly notified her that they intended to cause her eviction by legal proceedings. The Respondent, therefore, saw that, if the sale were carried out, she would be liable to be made Defendant in six petitory actions, which would probably give rise to as many actions *en garantie ;* and, therefore, very reasonably wished to refrain from carrying out a contrat likely to subject her to such consequences. And, yet, Appellant, instead of offering to desist from the sale, when formally notified of the facts above mentioned, has attempted to enforce it by means of the present action, which, under the circumstances, was, I think, rightly dismissed.

Jugement confirmé. (14 *D. T. B. C.*, p. 344.)

ARCHAMBAULT, pour l'Appelant.

MOREAU, OUIMET et CHAPLEAU, pour l'Intimée.

(1) Montreal, No 878, *Berthelot* vs. *Bourne*, Oct. 1847 : 1496, *Beauregard dit Champagne* vs. *Jourdain*, 11th Jany. 1847 : 1032, Sep. 1844, *Griffith* vs. *Vaillant*.

PRACTICE—COMMISSION ROGATOIRE.—BIRTH.—STATUS.—PROOFS.

COURT OF QUEEN'S BENCH, APPEAL SIDE,

Montreal, 7th December, 1863.

In appeal from the Superior Court, District of Montreal.

Coram SIR L. H. LAFONTAINE, Bart., C. J., DUVAL, J. MEREDITH, J., BADGLEY, A. J.

EDWARD W. LANE, Plaintiff in the Court below, Appellant, *and* DAME MARY A. CAMPBELL, Defendant in the Court below, Respondent.

Held: That a motion by a Plaintiff for a *commission rogatoire* to examine certain witnesses at or near St. Paul, Minnesota, was well founded in law and practice of the Court.

That such commission may be granted on the application of the Plaintiff though unsupported by affidavit.

Semble that such a commission applied for by a Defendant should be supported by affidavit. (1)

That where registers do not exist of the birth of a person, such person has a right of action to establish by a judgment of the Court the date and place of such birth, and he does not need to show any special interest to procure such judgment apart from the non-existence of such registers.

That the date of birth is an important part of the status of a person giving him a right of action to establish such date. (2)

This was an appeal from a judgment of the Superior Court at Montreal, rendered on the 30th May, 1863, dismissing a motion made by Appellant and Plaintiff for a *commission rogatoire* to examine certain witnesses resident at or near St. Paul, Minnesota. The action of Plaintiff was brought against Defendant, who was his step-mother and tutrix of her minor children, Catharine Caroline Lane and Campbell Lane, the sole brother and sister, and co-heirs of Plaintiff. The declaration alleged the marriage of Elisha Lane with Harriet Wickstead, on the 27th March, 1819; that Plaintiff was the only surviving issue of the marriage, and was born on or about the 10th October, 1822, at the Parish of Terrebonne, his father's then domicile; that Harriet Wickstead died on or about the 19th April, 1832; that Elisha Lane, in 1848, married Defendant, Mary Ann Campbell; that the only surviving issue of this second marriage were Catherine Caroline Lane, born in 1855, and Campbell Lane, born in 1859; that Elisha Lane died in August, 1862, and Defendant was appointed tutrix to her minor children, Catharine Caroline and Campbell Lane, in September, 1862; that it is necessary, that Plaintiff should be

(1) V. art. 307 et 308 C. P. C.

(2) V. art. 13 C. P. C.

able to establish, and Plaintiff has an interest in establishing, his status as such sole surviving issue of Elisha Lane, by said marriage with Harriet Wickstead, as well as the date and period of his birth; that, in order to establish such status and date and period of birth, diligent search has been made in divers registers and among divers records, both in the Parish of Terrebonne and at various other places, but that Plaintiff had nevertheless failed to discover any entry or registry or written proof of the said birth ; that Plaintiff having such interest in the establishment of his status and date and period of birth, applied to Defendant as such tutrix to admit such status, and that Plaintiff was so born on the tenth October, 1822, yet, nevertheless, and notwithstanding incontestable evidence of such date and period, Defendant has refused and still refuses to admit such status and date and period of birth, unless the registered or certified entry of such birth be produced ; "that, seeing the premises, Plaintiff desires to avail himself of the testimony of divers persons advanced in years while still living, and, thereby, as well as by writings and by documentary evidence, to prove and establish his status and the date and period of his birth, and, in order thereto, is desirous of bringing before this Court Dame Mary Ann Campbell and Catherine Caroline Lane and Campbell Lane, represented by Dame Mary Ann Campbell, their tutrix, as the persons interested in the establishment of such status and date and period of birth of Plaintiff, and, in their presence, duly and legally, to prove the same to the end that Plaintiff may not be damnified by the want of such entry of record. Wherefore Plaintiff brings suit and prays that Defendant, as well in her own right as in her said capacity, may be summoned to be and appear before this Court, on the ninth day of March next, and that Plaintiff may be permitted to adduce evidence of his birth, and of the date and period thereof, and of his status as such issue of Elisha Lane deceased ; and that, upon the adduction of such evidence, the said status and date and period of birth may be declared by this Court ; and that this Court do declare and establish that Plaintiff was born in the Parish of Terrebonne, issue of the marriage of Elisha Lane with Harriet Wickstead, and that Plaintiff was so born issue of the said marriage on the 10th October 1822. The Respondent pleaded the following exception : That Plaintiff had always been publicly known and recognized as the son of Elisha Lane, issue of his marriage with Harriet Wickstead, and that such status has been recognized and assented to by legal documentary evidence, and more particularly by the inventory of the effects belonging to the community which existed between Elisha Lane, his father, and his wife Harriet

Wickstead, executed before Campbell and Colleague, Notaries Public, on the 29th March, 1844, and duly closed *en justice*, at Quebec, the 3rd April, 1844, wherein it is stated that Plaintiff was the son of Elisha Lane, issue of his marriage with Harriet Wickstead, and of the age of nineteen years. Also, in and by a certain *acte de tutelle* to Plaintiff at Quebec, on an *avis de parens* duly homologated before Sir James Stuart, on the 19th February, 1844, wherein Elisha Lane was appointed tutor, and Thomas Gibb subrogated tutor to Plaintiff, then being a minor of 19 years. That also by certain articles of clerkship executed before witnesses by and between Elisha Lane and G. O'Kill Stuart, on the 21st August, 1844, wherein G. O'Kill Stuart agreed with Elisha Lane to take Plaintiff, a minor of the age of twenty years, as his clerk, and Plaintiff being a party to the said articles, did declare that he was a minor at that period and time of twenty years. That the status having been always acknowledged and Plaintiff having always, since his birth, been in possession of the *état* or status, as the son of Elisha Lane, issue of his marriage with Harriet Wickstead, he has no interest whatever, and has shown none to entitle him to enter upon the evidence and period of his birth, and that Defendant is not bound by law to enter into a contestation upon such period of time of birth, which could only be valuable in order to establish his status, which has never been denied; but, on the contrary, universally admitted by all parties who have any knowledge of the family, and more particularly by Defendant and the public generally. Wherefore, Defendant, protesting against the admission of any documentary or verbal evidence to establish the date, period and place of birth of Plaintiff, prays that the action be dismissed. Another exception was pleaded containing the ground above mentioned, and in addition that Plaintiff cannot be permitted to prove a period and time of birth other than that assumed by him in the article of clerkship and established thereby, as also by the inventory and *acte de tutelle.* The Plaintiff, by a first answer to the first plea of Defendant, averred that the paper styled an inventory was null and void for reasons he should set forth when occasion should require, and that, at the dates of said inventory and *acte de tutelle*, he was a major of full age, and that he was no party to nor privy, nor was he cognizant of such pretended inventory and *acte de tutelle* till a very recent date; and, further, at the date of the articles of clerkship, he was ignorant of his status as a major, and that such articles of clerkship were signed by Plaintiff at the request of Elisha Lane, and in such ignorance. The Plaintiff further denied all the allegations of the said first plea. Among the articulation of facts produced by Plaintiff and answered by

Defendant were the following: *Articulation 3rd*: Is it not true that, on or about the 27th March, 1819, Elisha Lane, being then in the Parish of Terrebonne, in the then district of Montreal, intermarried with Harriet Wickstead, of Montreal, spinster? *Answer*: Yes. *Articulation 4th.*: Is it not true that the only issue of said marriage now living was plaintiff, and that Plaintiff was born at said Parish of Terrebonne, on or about the 10th day of October, 1822? *Answer*: It is true that the only issue of said marriage now living is Plaintiff, but the date and place of birth is denied and, moreover, is immaterial and impertinent. *Articulation 7th*: Is it not true that, after diligent search to that end, Plaintiff hath failed to discover any entry, or registry, or written proof of his birth? *Answer*: The matter herein enquired is unknown to Defendant and is, moreover, immaterial and impertinent. Defendant submitted articulations as follows: 1st. Is it not true that, in the extract from the records of Medical Examinations kept by the University of Edinburgh, Edward W. Lane mentioned therein is Plaintiff? 2nd. Is it not true that the said extract is a true and accurate extract in every particular from the Records of Medical examinations of Edinburgh? The extract produced duly authenticated shewed that, at the College examinations whick took place the 6th and 7th of July, 1852, Plaintiff entered himself as aged 28 years, residence Royal Circus, Edinburg? After issue joined, Plaintiff made the following motion: " That a commission in the nature of a *commission rogatoire* do issue to commissioners to be named for the examination of certain witnesses resident at or near St. Paul, in the state of Minnesota, one of the United States of America, to be produced, sworn and examined on behalf of Plaintiff, returnable without delay." The following is the substance of the observations of the Honorable Judge in rendering judgment: " This is an action brought by a gentleman against the tutrix of the minor children of his deceased father claiming to have his status as a son established. It is a general action of this description seeking nothing further than the establishment of such status. The Defendant pleads that such status is admitted, and was never denied. Issue is joined, and Plaintiff moves for a *commission rogatoire* to examine an elderly lady whose evidence will be valuable as to the period of the birth. But it is not the date of his birth, but the fact of his birth that gives him his status, and that fact is established. If Plaintiff adduces evidence, under this commission, and Defendant contradictory evidence the real issue is entirely unaffected, it being a question of status only. Had Plaintiff complained of acts done by his father to his injury, and sought to set them aside, and had he shown that

the validity of such acts depended on the date of his birth, there would have been an issue wherein I could have granted this commission, as it is the motion must be dismissed." The following was the judgment, (SMITH, J.,) 30th May, 1863: "The Court, having heard the parties, it is ordered that Plaintiff take nothing by the said motion." The Plaintiff was aggrieved by this judgment, and obtained leave to appeal from it.

R. LAFLAMME, for appellant: The Plaintiff required to examine, as a witness on his behalf, an aged lady of 70 years, sister of his mother, and who was present at his birth, and who is now resident at St. Paul, Minnesota, and the *commission rogatoire* was asked for, chiefly to obtain her evidence. It was the duty of Plaintiff, and he did move for the commission at the earliest opportunity, and the practice of the Court always has been to grant the commission even when applied for by a Defendant without any affidavit and without other formality than a motion in Court on notice to the other side. *Willis* vs. *Pierce*, 2 L. C. Jurist. 77; *Johnston* vs. *Whitney*, 6 L. C. Jurist, 29. (1) It was undoubtedly incumbent upon Plaintiff, to prove the allegations of his declaration which were put in issue by the *défense au fond en fait*.

HENRY STUART for Respondent: The action purports to be a demand to be recognized as the issue of the marriage of Elisha Lane and Harriet Wickstead, founded upon the facts that Defendant has denied such status, and that he has a manifest interest in being permitted to prove the same. Idle suits are not allowed by Courts of Justice, and Plaintiff cannot be allowed to proceed with his cause, unless his status has been so denied. The Defendant pleaded that he had always been recognized as such son, by her, by the family generally, and that it was a matter of public notoriety, and that he had been so recognized in the important family papers therein mentioned. The Defendant, by her answers, admits the status, yet Plaintiff persists in attempting to adduce evidence to prove that which is admitted and which was never put in issue. The only interest which Plaintiff has exhibited, in his declaration, is to be declared the lawful issue of the marriage of his father with a former wife, but Plaintiff has no interest, and has certainly asserted no interest in proving his age. That is no part of the action; it would be merely a piece of evidence to prove the filiation, if denied. The intention of Plaintiff was not to establish the filiation, as is pretended by his

(1) Une commissoire rogatoire peut être accordée sur motion sans affidavit. (*Willis et al*, vs. *Pierce*, *C.S.*, Montréal, 27 février 1858., DAY, *J.*, 2 J., p. 77. Même décision dans la cause de *Johnston* vs. *Whitney*)

declaration, because that had been always admitted, but to attempt to prove a period of birth which would disturb rights of property. The inventory of the estate of his father and mother would be set aside, on the ground of his majority, he having been represented as a minor and by his sub-tutor. Abstract questions without shewing an interest involved will not be decided, and Defendant could only be called upon to dispute the question of Plaintiff's age, when he demands the partition of his father's estate as if no inventory had been legally made. In addition it was incumbent to prove that the registry of births, at Terrebonne, had been searched, and that no entry could be found therein, before oral evidence could be admitted to supply the absence of such entry. The Respondent, believing that the judgment rendered by the Court below is founded on law and justice, trusts that the same will be confirmed.

DUVAL, J., giving judgment in appeal, said: This is an appeal from a judgment rejecting Plaintiff's motion for a commission in the nature of a *commission rogatoire* to examine witnesses in one of the United States of America. We are of opinion the motion should have been allowed. In the case of a Defendant making the application, an affidavit of circumstances is required; not so when the motion is made by Plaintiff, unless there are grounds for supposing that he wishes to retard the proceedings. In this case, Plaintiff wishes to prove a fact he considers essential to support his demand. He is the judge of his own interests, and has a right to conduct his case as he understands those interests, unless he does a wrong to his adversary. Of what does Defendant complain? He says the fact is of no importance. The Court cannot agree with him in this. The Defendant further urges that parol evidence is at this stage inadmissible. The answer is, if well founded, this objection may be taken at the arguments on the merits. The Plaintiff ought, therefore, to be allowed to go on, this commission he desires to sue out, not being of a character which, by any possibility, can prejudice the rights of Defendant.

The judgment in appeal was as follows: "Considering that the motion made by Appellant and Plaintiff in the Court below, for a *commission rogatoire* to examine certain witnesses resident at or near St. Paul, Minnesota, one of the United States of America, was well-founded in law, and was made according to the course and practice of the Court, and ought, therefore, to have been granted, and that, in the judgment pronounced by the Superior Court, sitting at Montreal on the thirtieth day of May 1863, rejecting said motion, there is error: this Court doth annul and set aside the judgment so

pronounced by the Superior Court on the thirtieth day of May, 1863, and this Court proceeding to render the judgment which the Superior Court ought to have rendered, doth grant the motion so made by Plaintiff, and doth order that a commission in the nature of a *commission rogatoire* do issue, addressed to certain commissioners to be hereafter named, according to law, and to the course and practice of the Superior Court, for the purpose of examining Plaintiff's witnesses, resident at or near St. Paul, Minnesota, the said commission to be made returnable without delay. (8 *J.*, p. 68.)

R. LAFLAMME, for Appellant.

H. STUART, for Respondent.

SALE.—CONDITIONAL DELAY FOR PAYMENT.

COURT OF QUEEN'S BENCH, Montreal, 1st March, 1864.

Coram DUVAL, J., MEREDITH, J., MONDELET, A.J., BADGLEY, A.J.

JOHN YOUNG *et al.*, *Plaintiffs in the Court below*, Appellants, *and* JAMES E. MULLIN, *Defendant in the Court below* Respondent.

Held: That a party purchasing for over $100, at an auction, where the terms of sale are announced to be,—" over $100, four months, paper satisfactory to the sellers from this date,"—is not entitled to the credit, without giving or tendering such satisfactory paper, and, on failure of the purchaser to give or tender such satisfactory paper, the vendor may sue, in an ordinary action of *assumpsit*, for the price, purely and simply.

This was an appeal from a judgment rendered by the Superior Court at Montreal, on the 25th day of June, 1863, (The HON. MR. ASST. JUSTICE MONK, presiding.) The action was in the ordinary *assumpsit* form, to recover the sum of $2,616.72, as and for goods sold and delivered by Appellants to Respondent, and was served on the 19th of September, 1862. The sale was one by auction, and took place on the 28th of May, 1862; at which the terms were announced to be, " over $100, four months, paper satisfactory to the sellers " from this date." And, according to the conditions of the sale, all purchasers who should pay their purchases before the 28th of June, 1862, were to be entitled to a discount of 2½ per cent. The Respondent pleaded, " that the tea in question, and for the price of which this action is brought, was sold to and purchased by him, on the 28th day of said May last upon a term of four months' credit;" that, on the 27th day of Sept. 1862 (the 28th being a Sunday), he, Respondent, had tendered to Appellants his accepted check on the Bank of Toronto, for

the amount of his purchase, and that he was still willing to pay that amount with interest at 7 per cent., from the date last mentioned (which he consigned with his pleas), but, that Appellants should not recover costs and, on the contrary, should be condemned to pay him costs. The Appellants replied, to the effect, that Respondent had not only failed to pay for his purchase in cash, or to give paper therefor, satisfactory to Appellants, payable in four months from the date of sale, but had positively refused, after repeated applications for settlement by appellants, who even offered to take Respondent's own note for the purchase, payable as above mentioned, to settle otherwise than by giving his own note, dated some fifteen or eighteen days from the said 28th day of May, 1862, and payable in four months from its date. And that Appellants, having exhausted every means in their power of obtaining an amicable settlement from Respondent, instituted the present action against him. The following was the judgment of the Superior Court: " The court, considering that Defendant hath established, by legal and sufficient evidence, the material allegations of his pleas, firstly and secondly pleaded; considering that it appears, by the proof adduced, that the sale of teas mentioned in the pleadings, and the amount of such sale, were not completed and determined on the 28th day of May 1862, as pretended by Plaintiff; considering that it appears, by the evidence adduced, that the said sale of teas and the amount thereof were completed and determined at a period subsequent to the twentieth day of June 1862; considering that the offer to grant a note, or the tender of the note made by Defendant, is proved, bearing a date subsequent to the twenty-eighth day of May, 1862, was, under the circumstances of this cause, a sufficient compliance with the terms and conditions of the sale of the twenty-eighth day of May, 1862; considering that the tender of the amount claimed by this action, less the costs of suit, made by Defendant to Plaintiffs on the twenty-seventh September, 1862, was a good, legal and sufficient tender, under the circumstances of this case, doth declare the tender of the twenty-seventh September 1862 good and valid, and doth condemn Defendant to pay to Plaintiffs the sum of $2645,47, to wit: the sum of $2616.72, being the price and value of a large quantity of tea of about eighty-one packages sold and delivered by Plaintiffs to Defendant, at an auction on the twenty-eighth day of May 1862, at a credit of four months; and the sum of $18.75, being the interest calculated upon the said sum of $2635.47, at the rate of seven *per centum per annum*, from the twenty-eighth day of September 1862, when the said amount became due to the third day of November, 1862, date of the pleas of Defendant,

and the court doth adjudge and condemn Plaintiffs to pay the costs of the present action."

BETHUNE for Appellants, argued that the judgment appealed from had in effect maintained, that Respondent's offer of a note at 4 months, dated 15 or 18 days after the date of sale was valid, and that Respondent was consequently entitled to an absolute credit, until about the 12th or 15th of October, 1862, and that Respondent's tender of check before alluded to was, under the circumstances of this case, a sufficient tender in law, whilst the judgment, at the same time, declared, that the debt became due on the 28th day of September, 1862. Apart from the manifest contradiction to be found in the judgment as to the precise term of credit, it would seem that the Honorable Judge, who pronounced it, meant to hold with Respondent, that the credit was an absolute one for 4 months, whether from the 28th May, or the 12th or 15th of June, however, does not very clearly appear. The judgment, under either aspect, was erroneous. The condition of sale manifestly made the term of credit dependent on the giving of a note, satisfactory to Appellants and dated on the day of sale, and payable in 4 months from that day. Such a note not having been either given or even tendered before action brought, and, on the contrary, Respondent insisting that he had a right to a credit of four months, and some 15 or 18 days, Appellants were clearly right in sueing Respondent, as they did, for the amount of the purchase, purely and simply.

STUART, Q. C., followed, and cited Parkford & Maxwell, 6th Term Reports, p. 52; Owenson & Morse, 7th Term Rep., p. 64; *Londesborough* vs. *Mowatt*, 28 Eng. Law and Eq. Rep., p. 119; and *Milford* vs. *Mayer*, 1 Douglass Rep., p. 55.

DOHERTY, for Respondent, contended that Plaintiffs, by their answers, admitted the sale to be *à credit*, but pretended that this was on condition of Defendant giving Plaintiffs "paper satisfactory to sellers;" that Plaintiffs waited for a month after the sale before calling on Defendant for a settlement; that Defendant refused to pay cash or otherwise than by his own note dated fifteen or eighteen days from the 28th of May, 1862, and payable at four months from its date; that, as Defendant would do nothing, Plaintiffs were compelled to institute the present action. The *enquête* established that the sale, as understood by Mr. Law *himself*, one of Appellants, was on terms such as stated by Defendant, *à terme*, and that Defendant had the option to pay by his own note; that the teas in question were to be weighed before their price, a price per lb. could be arrived at; that this weighing was not performed till subsequent to 20th June; that Defendant duly offered his note to Plaintiffs, but they refused it, and, subse-

quently, arbitrarily and prematurely, sued him, as if the sale had been for cash, wihch all agree it was *not*. From all that was proved, it was plain that the *offres* made by Defendant's plea did all justice to Plaintiffs. The judgment appealed from, which declares Defendant's *offres* good and sufficient, and awards Plaintiffs the amount deposited, but charges them with costs of suit, is fully warranted by the facts proved. It violates no law. It has done Plaintiffs no injustice, and there was no necessity of appeal from it. Even, according to Plaintiffs' own statements, in their special answers, their action was misconceived. Supposing an *acheteur*, at an auction to buy goods, on terms of giving "paper at four months, satisfactory to the sellers;" suppose him to get the goods, and, after that, on being put *en demeure* to refuse to give such paper, the action of the *vendeur* against him, before the expiry of the four months, could not be and is not assumpsit, as for goods sold and delivered and to be paid for *cash*. *Mussen* vs. *Price*, 4 East. "Any lawyer would know that." Per BAYLEY, J., in *Day* vs. *Picton*, 10 B. & Cresswell. That is so in England, and so it is in Lower Canada. "Si in diem sit obligatio ante diem non potero agere." "Dies adjectus efficit ne præsente die pecunia debatur. Ex "quo apparet die adjectionem *pro reo* esse." Before the expiration of the four months, such *vendeur* can sue for the "objet promis par la convention," (the note) or for damages. Or he can revendicate. If Plaintiffs had right to such remedies, they might have used them; but they had no right to make other new remedies for themselves. When they sued, they had no right to the money sued for, alleged cash price of goods sold and delivered, alleged cash price due. *The real price of the teas sold here was a note.* There was not *convention* for anything else. Further, until the weighing of the teas, the sale was not completed. Any note, under such circumstances, ought properly to have been asked as from date of the weighing only. In all aspects, or any, the Court here, it is humbly submitted, cannot but confirm the judgment of the Court below.

MACKAY followed and cited a case in the Superior Court of *McGinnis* vs. *McClosky*. (1)

BETHUNE, in reply: The leading case in England relied on by Respondent (*Mussen* vs. *Price et al.*, 4th East's Rep., p. 147,) in no way contradicts the legal position assumed here by Appellants, namely, that they had a right to sue, under

(1) Si, dans une action d'assumpsit pour valeur d'ouvrage fait, le Défendeur plaide et prouve que l'ouvrage a été fait en vertu d'un contrat, l'action sera renvoyée. (*McGinnis* vs. *McClosky*, *C.S.*, Montréal, 30 avril 1857, DAY, J., SMITH, J. et CHABOT, J., 6 R.J.R.Q., p. 24).

the circumstances, before the expiration of credit of 4 months. In that case, which was one of assumpsit for the price of sale, the majority of the Judges held, not that the action was premature, but that it ought to have been one in damages and not in *assumpsit*, for the purchase money; admitting, at the same time, that the proper measure of damage would be the price at which the goods were sold. But, even there, the Judge before whom the case was tried (ROOKE, J.,) charged the jury that, unless Defendants could show that they had given or tendered the bill, the action lay for goods sold and delivered. And LORD ELLENBOROUGH, Ch. J., on the application for a new trial, said: the "present feeling of my mind is, that this action is well brought." The question here involved, however, being one purely of form as to the mode of declaring, our own law proper must prevail, and that certainly never sanctioned such a subtle distinction as was maintained in the case under review. The law on this point is correctly stated in an *arrêt* reported by Dalloz, in his *Recueil Périodique*, vol. of 1835, pt. 2, p. 132: "En matière commerciale, " faute par l'acheteur de fournir, comme il s'y était obligé, des " traites à terme en paiement du prix de la vente, le vendeur " peut, *avant l'expiration du terme, poursuivre son paiement* " immédiat." And the doctrine enunciated in this *arrêt* is stated by *Devilleneuve* and *Massé* to be "*Jurisprudence*" in France. Dict. du Cont. Coml., Vo. Vente, page 691, No. 288.

BADGLEY, J.: At an auction sale of Appellants' teas, on the 28th May, 1862, conducted by John Leeming, auctioneer, the conditions of sale were as follows: " Of and under $100 cash on delivery, over $100, four months, paper satisfactory to the sellers, from this date." The Respondent purchased 91 packages which were delivered, of which 10 half chests were returned. The established amount of the purchase was $2616, 72 cts. An invoice with the terms 4 months from sale inserted therein, was duly delivered to the buyer, and he was duly called upon to fulfil the conditions by giving the stipulated note. Two *months* after the expiring of the first month, he offered to pay in cash, less a discount of 2½ per cent to 2 per cent, which was declined by the sellers, and simple interest offered by them, which was refused by the purchaser who both before and after that offer had been willing to give his note, but always for a period prolonging the 4 months 15 to 18 days after the time of *credit* limited. The purchaser claimed the extension of time on account of alleged delay in the delivery of the goods. The evidence shows that the delivery was finally completed early in June, without precising either the date, or the quantities previously delivered, and that the buyer made all sorts of objections about the

quality and weight, which terminated in the return of the 10 half chests, the sale price of which deducted from the gross purchase left the net sum of $2616.72 cts. due by the purchaser. On the 17th of Sept., 1862, the vendors applied again for a settlement, which on the 18th was replied to by another offer of the buyers note with 10 days extra to run beyond the 28th Sept., the expiry of the 4 months' credit, which was declined, and the action was thereupon instituted on the 19th September. On the 27th Sept., the 28th being Sunday, the buyer offered his accepted check for the full amount of $2616.72 cts., which was not accepted because he would not pay the costs of the action then incurred. The vendors admit that the buyer's own note would have satisfied the sale conditions as to a satisfactory note and that the offered accepted check was equivalent to cash. The action instituted on the 19th Sept. is in the common assumpsit form for goods sold and delivered, for the price of $2616.72 cts. and which Defendant then and there promised to pay, but neglected, &c. The pleas set out the special contract, the purchase under the auction condition of an absolute credit of 4 months as a thereby special agreement and the consequent prematurity of the action at the same time tendering the sum of $2616.72 cts. with interest for 17 days, from 28th September to date of plea, but without costs, and praying costs against Plaintiff. In reply, Plaintiffs admit the mode and conditions of the sale and purchase, as stated, Defendant's refusal to take advantage of the discount after one month as stipulated, and to conform to the conditions of sale, by giving his note dated at a credit of 4 months from the sale, and hence the institution of the action at the time. The matter in dispute between the parties previous to the action was at first the difference between the simple interest offered, and the 2 per cent tendered, amounting to about $20, then, as to the amount of 10 days' interest upon the note tendered which note would have been received, had the buyer been willing to pay interest upon the extension fixed by himself, say about 25s, and lastly the costs which had accrued upon the action when the tender was made on the 27th September, and which would have been of no great amount. However trifling these differences between the parties might be, points of commercial and practical professional interest have arisen in the case and been submitted, which must now be decided. Before setting the legal point in the case, it is right to remark, that Defendant has not, in his pleadings, complained either of the quality or of the alleged delay in the delivery of the teas which had been urged by him as the ground for his claiming the extension of the time of payment, thereby

impliedly admitting that the delivery was in time, and the quality correct. His tender, on the 27th for the 28th, and its iteration in the plea with interest from that time, corroborate the sufficiency of the said quality and delivery, and Defendant's own admission that the four months in question ran from the 28th May to the 28th September, is of record in the action. The pleas of Defendant in fact simply offer the issue of his purchase at an absolute credit of 4 months, and plainly and manifestly contradict the ground assumed by him for claiming the extension of the credit limit beyond that fixed by the conditions of sale. He was in that respect in his own wrong all through. The contestation has become narrowed to the question of the absoluteness of the credit of 4 months from the 28th May. Upon this point, the testimony of record must be adverted to for a moment. The auctioneer, Leeming, says that sales for sums exceeding $100 are credit sales, to be settled in the mean time by note. Hodgson, Plaintiff's clerk, says usually everything under $100 is cash, and over that amount is on credit. Law, one of Plaintiffs, is acquainted with the customary conditions of sales such as that referred to in this case, which are usually cash up to a certain amount, and a term of credit for larger amounts. Up to £25, the customary terms are cash; over that amount they are credit. This testimony is conclusive that the term of 4 months in this sale was a term of credit. The authorities are equally conclusive: 2 Parsons, p. 456-7, *Contracts*." If the goods are sold on credit, that is, if it be a part of the contract of sale, that payment shall be made at a future day, there can of course be no suit for the price until that day. This is undeniable, both in english and french jurisprudence, because, in that simple case, the term is for the benefit of the purchaser, and the old axiom applies *qui à terme ne doit rien*." But, if a mode or qualification be added to be performed by the buyer, then the benefit is mutual, the buyer obtains his term of credit, and the vendor obtains a mode of assisting himself in the interval. In this case, the agreement was that the buyer should have 4 months' credit from the day of sale upon his furnishing the vendors with satisfactory note. He obtained his credit, but did not furnish the note. What then was the right of the vendor under the agreement? Parsons, *On contracts*, (*loc. cit.*)says: " But if it is also a part of the contract that a note shall be given immediately, which is to be payable on that future day, if this be not given, an action can at once be maintained for it, not only because it is a separate promise, but because by the practice of merchants *this note might be made, by the vendor's getting it discounted, the means of present payment*," Thus the mutual benefit, the credit on the

one side, and the means of present payment on the other, are clearly stated. Addison, *On contracts*, p. 240, maintains the same principle as above enunciated by Parsons, and the text writers, and adjudged cases entirely concur in the right of the vendor to maintain an action *to obtain the note.* Addison, p. 1120 : If the goods are sold upon terms, that the purchaser is to give his acceptance at two, three or more months for the price, and the goods are then delivered to the purchaser, and the latter refuses to give his acceptance according to the contract, the vendor cannot forthwith bring an action for goods sold and delivered, but must sue either on the promise to give the acceptance or wait the termination of the period the bill or note had to run. 4 Term. Rep. 1803, p. 146, *Mussen* vs. *Price,* may be considered the leading case, in which Lord Ellenborough recorded his dissent from his colleagues, who " *held* that the buyer, in such a case as this cannot be sued in action for goods sold and delivered, but upon the special contract only, and that he could not be sued in that form of action till after the expiration of the term," and, in 3 Boss. & Pull. 1803, p. 582, *Dutton* vs. *[illegible]monson,* Lord ALVANLEY, Chief Justice, who entertained the same opinion as Lord Ellenborough, yielded and followed the rule in *Mussen* vs. *Price,* especially knowing that his colleagues in his own court differed from him. Since that case of *Mussen* vs. *Price,* Lord Ellenborough also yielded to those rulings as seen in 9 East. 498, 1808, Hoskins et al., assignees of Drighton, and again in 3 Campbell 329, *Hutcninson* vs. *Reid,* in which he held that until credit expired there was no debt due, 1813. And the current of authorities since 1803 has been all that way in England. *Hoskins* vs. *Duperray,* 9 East. 498. *Cuthay* vs. *Murray,* 1 Camp. 335. *Griffin* vs. *Longfield,* 3 Camp. 254. *Joseph* vs. *Knox, ditto* 320 ; *id* 329 ; *id* 414. Boss. & Pull. p. 330, Brooks & White. The same has been also held in Upper Canada, 5 U. C. Q. B. Repert., p. 159, *Wakefield* vs. *Gorrie,* in which the court held that such a purchaser was one unconditionally *on credit,* and could not be treated as a purchaser *for cash* upon his refusal to furnish the note, and could not be sued on common counts before expiry of the time. Now, in the case of *Mussen* vs. *Price,* the action was for goods in common assumpsit form before the expiry of the time of credit, and the judges objected because the action was brought upon an assumpsit "implied in law, " and not upon an express assumpsit, that it was not an " implied contract, but express, including the terms on which " one agreed to buy and the other to sell, for the non-perfor- " mance of which the party *had his remedy in damages* ; the " vendor's argument going upon an assumption that the " giving of the bill was a condition upon which the credit was

" to be given, said there was no such condition in the contract, " the vendor would not have the full benefit of his contract, " if he is called upon for the full sum before the expiration of " the credit, but the terms of the contract were also introduced " for the benefit of the vendor, *that he might have in his* " *hands an instrument which he could negotiate.*" And in *Brooks* vs. *White, Boss.* and *Pull.* above cited, J. CHAMBER said the qualifications respecting the mode of payment are for the benefit of the purchaser, and during the time to which they relate, the seller must sue on a special contract. There is also an American authority which is important: 21 Wendell, p. 90, *Hanna* vs. *Mills and Hooker,* in error from Superior Court, N. Y. city, in which all the English cases were referred to and commented upon. Mr. Justice Bronsdon, the presiding judge in error, having reviewed them as settled, he thus proceeds: " the right of action is as perfect on a neglect " or refusal to give the bill as it can be after the credit has " expired. The *only difference* between *suing at one time or* " *the other relates* to the *form of the remedy ;* in this case the " Plaintiff must declare specially; in the other he may declare " generally. The *remedy itself is the same in both cases;* the " damages are the price of the goods. The party cannot have " two actions for one breach of a single contract; and the contract " is no more broken after the credit expires than it was the " moment the note or bill was wrongfully withheld." It is undeniable that a sale upon the conditions stated and proved in this case is a sale upon credit; and it is equally undeniable that such credit sale coupled with the agreement by the purchaser to furnish a note for the price of the goods purchased would give immediately rights to the vendor to demand the note. Technically the common assumpsit form for goods sold is for the price of goods sold. and promised to be paid presently, but neglected, to the vendor's damage, of what ? How is it measured ? By the price of the goods. The special assumpsit for non-delivery of a note representing the price of those goods, but neglected or refused to be given, is also to the vendor's damages, in what ? How to be measured in that case ? Why still by the price of the goods. In both cases, the damage then is the same, namely, the price of the goods as remarked by Mr. Justice BRONSDON, and the only difference is the form of the remedy, as he observes: but though both result in damages established by the price of the goods, the two forms of action are dissimilar in this, the evidence that would support the common assumpsit would not sustain the special assumpsit, and the proof upon the express contract would show something different from an implied contract. Now, in our practice, we are not tied down to the strict niceties of the

English forms of action, and, sometimes, very much to our practical disadvantage, because it becomes necessary to make up the issues by special pleadings which, in many cases, in fact, do not tender issues upon the action brought, but as it were, make new demands. In this case, for instance, the form of remedy is the common assumpsit form, showing the sale and delivery of the teas for the price named with the implied contract attaching to the purchaser to make present payment. The proof, in such a case, is necessarily simple, that of the purchase and receipt of 81 boxes of the tea for such a value, the law filling in the implied contract. But the special pleas and answer have brought into Court a special agreement, and that it is that special contract, not the implied assumpsit, which is the matter of the contract; it is in fact the damage suffered by the non-delivery of the note, which would have furnished the price by means of the discount of the note for money, and that damage is the value of the goods. The case, as appears then in the pleadings, will be more plainly stated coloquially. The Plaintiffs say: You Defendant, on the 28th of May, 1862, purchased our teas for the price of $2,616.72, which teas were delivered to you then and there, and the price of which you promised to pay to us presently on demand. The Defendant answers: True, I bought the teas for that price; but you agreed to give me a credit of four months from the time of sale, and you cannot ask for the money until that time has expired. The Plaintiffs reply: Yes, we did agree to give you that credit, but it was on the condition that you did then and there give us a satisfactory note at four months from the date of sale, which, in commercial usage, would have given us the use of the money, by means of its discount, and without interfering with you. You have had our teas in your possession, and thereby enjoyed our capital, and having refused to furnish to us the note or its representative; you have therefore caused the damage of the price of your purchase. In this state of the pleadings, mere technical forms disappear altogether, and the case is submitted as it in fact is. None of the english or other cases cited above present such a state of pleadings as this case, and to that extent are not strictly applicable upon the question of remedy, or form of action, or of the question of procedure; this case must be taken up and adjudged as it is, in the contestation made up for judicial decision; nor can Respondent complain, because, as before observed, he was in his own wrong in unjustly claiming before action brought an extension beyond the term of credit, and in holding and using Plaintiff's goods, without affording to them *the means of having in their hands an instrument which they could nego-*

tiate as laid down by the judges in the case of *Mussen* and *Price*, and which is corroborated by a similar case under French law. Dalloz, *Jurisp. du Roy.*, 2e partie, 1835, p. 132; *Meerman* vs. *Bettomeyer*. A quantity of wine was sold, for which a credit note was to be given; the wine was delivered at once, and the note refused to be given. Action was at once instituted by the vendor against the purchaser. The case went by default against Defendant, and judgment was rendered for Plaintiff, the vendor. Upon Defendant's appeal, the original judgment was confirmed. The Court of Appeal, holding that the breach to give the note gave immediate right of action to the vendor to sue for the price, upon the ground, " puisqu'il " est de principe en matière commerciale que les effets de com-" merce sont la représentation d'une monnaie réelle, surtout " entre négociants." The principle of this French decision is in exact conformity with the principle of the English cases; the note is the representative negotiable equivalent of the goods sold and delivered, and the amount claimed is the price of the goods which becomes the measure of the damage suffered by Plaintiffs from the breach of Defendant's special contract to deliver the note when demanded. The decisions in both systems rest upon the commercial convertibility of the note into money, and the legal implication that the note was money in a commercial sense. Under these circumstances the judgment appealed from cannot be sustained, and the judgment must be in favor of Appellants.

MONDELET, J.: This is an appeal from the judgment rendered by the Superior Court of Montreal (MONK, J.) condemning Respondent to pay a certain sum of money, being the amount of a purchase of packages of tea sold to him on 8th May, 1862, at auction, by Jno. Leeming & Co., for Plaintiffs. The action was instituted on the 19th September, 1862. Defendant has pleaded he had a right to 4 months' credit, that he offered the amount by an accepted cheque but without costs: Plaintiffs refused. The Court has declared the offer by a cheque a legal tender. I am of opinion, from the record and evidence, that the judgment of the Court below should be reversed. 1. The credit of four months was not an absolute credit, but four months credit on satisfactory paper, &c., which Defendant, though bound to give, persisted in refusing, pretending at the time that he was entitled to an *absolute* credit of four months. 2. Whatever may be said as to Plaintiffs making no objection to the cheque offered by Defendant, still the Court below could not juridically in its judgment declare an offer made by a cheque to be a legal tender.

The following was the judgment of the Court of Appeals: The Court, considering that Appellants did, on the twenty-

eighth day of May, 1862, sell and deliver to Respondent the quantity of tea by him in his pleadings admitted, at and for the price and sum of $2616.72, at a credit of four months from said date, upon the condition of Respondent furnishing to Appellants negotiable paper, payable at the expiration of the said term of credit: considering that Appellants had, therefore, a legal right to demand and have from Respondent, at and after the said delivery, such negotiable paper payable as aforesaid, for the amount of the sale, and upon failure thereof by Respondent, to institute an action at law against him for the immediate recovery of the said sum of money: considering that Respondent did not comply with the demand of Appellants to furnish to them the said negotiable paper before the institution of their action in this behalf, and that their said action was not premature as alleged in the pleadings of Respondent: finally, considering that the tender made and fyled in this Court by Respondent on the twenty-seventh day of September, 1862, after the institution of the action against him by Appellants was not sufficient, nor good and valid in law, under the circumstances of the case, the same having been made for the amount of the said purchase with interest thereon from the date of the said tender only, and also less the costs of the action; considering that, in the judgment pronounced by the Superior Court at Montreal on the twenty-fifth day of June, 1863, affirming the sufficiency of the tender, and condemning Appellants to pay to Respondent the costs of suit, there is error, this Court doth reverse and set aside the said judgment, and proceeding to render the judgment which the Court below ought to have rendered doth condemn Respondent to pay to Appellants the sum of $2616.72, the price and value of the tea so purchased by him with interest thereon from the nineteenth day of September, 1862, the date of service of process, and also their costs of suit in the Court below as also all their costs in the court. (8 *J.*, p. 74 et 14 *D. T. B. C.*, p. 353).

STRACHAN BETHUNE, for Appellants.
HENRY STUART, Q. C., Counsel.
M. DOHERTY, for Respondent.
R. MCKAY, Counsel.

IMPUTATION.—BAIL EMPHYTÉOTIQUE.—RESCISION.—MISE EN DEMEURE.—SURSIS.

COUR SUPÉRIEURE, Montréal, 30 mars 1864.

Coram LORANGER, J.

DUFRESNE *vs.* LAMONTAGNE.

Jugé : 1o. Que l'imputation, faite dans une action non contestée et sur laquelle est intervenu un jugement *ex parte*, doit être maintenue à l'encontre du débiteur qui aurait dû la contester alors, s'il y avait lieu.

2o. Que, depuis l'abolition du système féodal, le bail à cens n'étant plus reconnu, notre loi ne reconnait comme baux à long terme que le bail à rente et le bail emphytéotique, et que, dans l'espèce actuel, le bail à long terme stipulé entre les parties est un bail emphytéotique.

3o. Que le droit de commise s'exerce à l'égard de ce bail sans aucune stipulation par le défaut de paiement de la rente ou canon emphytéotique pendant trois années et sans aucune mise en demeure de payer.

4o. Que le juge a le pouvoir d'accorder un sursis à l'exécution du jugement prononçant la résolution de ce bail avec faculté au preneur de payer pendant ce délai et de garder possession de l'héritage.

Le 9 avril, 1855, par acte appelé bail, fait à Montréal, Weekes, N. P., le Demandeur loua au Défendeur, un terrain vacant, situé à Montréal, pour quinze années, moyennant £10 par an, pour les dix premières années, et £15 pour les cinq dernières années, payables les 1er novembre et 1er mai de chaque année, en sus des taxes et cotisations. Le Défendeur s'obligea de construire sur ce terrain, des bâtisses de la valeur de £500 à £600, qui, à l'expiration du bail, appartiendraient au Demandeur, à sa faculté, en payant £200 au Défendeur, sinon, les bâtisses et le terrain deviendraient la propriété du Défendeur, moyennant le payement de £600 au Demandeur. Le 6 avril, le Demandeur paya au Défendeur, suivant qu'il appert par l'acte reçu ce jour là, devant le même notaire, la moitié de la somme de £200, et lui paya la balance le 14 mai de la même année, et ce, dans le but, y est-il dit, de favoriser le Défendeur. Le Demandeur, par son action, reclamait la somme de £45, pour quatre années et demi du loyer de ce terrain, et £13 6s. pour les cotisations, et concluait à la résiliation du bail. Le Défendeur a plaidé une première exception, alléguant qu'il n'avait jamais été mis en demeure de payer les arrérages, et qu'en conséquence, le Demandeur était non recevable en sa demande pour expulsion. Par la seconde exception le Défendeur allègue que, par un acte reçu, le 22 juin 1855, Weekes, N. P., le terme du bail a été prorogé à vingt ans, et que le loyer des cinq dernières années fut élevé à £19, et qu'au lieu de construire des bâtisses de la valeur de £600, il y a construit des bâtisses de la valeur de £1100 qu'il a payé tout son loyer jusqu'au 1er mai 1863, ainsi que les cotisations. Par sa réponse spéciale à cette seconde exception, le Deman-

deur a prétendu que la seule somme qui lui a été payée a été celle de £92 5s, et ce à diverses époques et qui a été imputée sur des billets et obligations que lui devait le Défendeur, pour le recouvrement desquels il a obtenu un jugement *ex parte* contre le Défendeur, et par lequel, crédit lui a été donné de cette somme qui a été imputée sur les billets et obligations.

LORANGER J.: Sur les faits de la cause, trois questions se présentent et elles ont été l'objet de plaidoirie des parties. *1ère Question.* Dans le silence des parties sur l'imputation de la somme de £92 5s. payée au Demandeur, cette somme a-t-elle été imputée sur les loyers ou sur l'obligation et les billets? *2ème Question.* Si le paiement de cette somme ne doit pas être imputé sur le loyer, quelle est la nature du bail du 9 avril, 1855? Est-ce un bail ordinaire soumis aux règles tracées par le Statut des locateurs ou locataires? Ou bien, est-ce un bail emphytéotique? *3ème Question.* Dans ce dernier cas, le défaut de paiement du loyer pendant quatre années et demie, emportera-t-il la rescision du bail et à quelles conditions? Sur la première question, deux règles de droit relatives aux imputations paraissent se trouver en conflit par rapport à la présente espèce. La première est: que, quand l'imputation n'a été faite ni par le débiteur ni par le créancier, elle doit se faire sur celle des dettes que le débiteur avait le plus d'intérêt à acquitter. La seconde est: qu'entre les dettes civiles, l'imputation doit se faire plutôt sur celles qui produisent des intérêts que sur celles qui n'en produisent pas? J'adopterais ce genre d'imputation et débouterais le Demandeur de sa demande, si ce n'était l'action intentée par lui contre le Défendeur le 12 octobre, 1863, sur la balance des billets et obligations, et le jugement rendu sur cette demande. Par le libellé de la demande et l'état qui y est annexé, le Demandeur a fait l'imputation de la somme de £92 5s. sur les billets et obligations, le Défendeur a accepté cette imputation en ne plaidant pas à la demande, et la cour l'a sanctionnée par son jugement, en condamnant le Défendeur à payer le montant de ces billets et obligations; moins la somme de £92 5s. payée. Le jugement dit en termes exprès que le Défendeur est condamné à payer au Demandeur la somme de £327 13s 7d, balance de £420 4s 5d, faisant la différence entre les deux sommes. Dans l'espèce à résoudre, les obligations et le billet produisaient des intérêts, le bail n'en produisait pas. Cependant le débiteur avait plus d'intérêt à acquitter le loyer dont le défaut de paiement pouvait emporter la rescision du bail, et la perte de ses améliorations que l'obligation dont on ne fait pas voir qu'elle emportait hypothèque; vu qu'elle n'a pas été produite. Sur ce conflit, il me paraît, que l'on doit suivre l'opinion de Pothier, qui, traitant de l'imputation des

paiements, au numéro 577 de son traité des obligations, dit, au corollaire 6 : " Tous ces corollaires peuvent recevoir par les " circonstances, des exceptions qui sont laissées à l'arbitrage " du juge. D'après les circonstances du litige, il faut que le juge arbitre l'imputation. Le Demandeur ne réclame le loyer qu'à compter du 1er mars, 1849, reconnaissant les avoir reçus jusque là. Le créancier a donc fait lui-même l'imputation, et le débiteur ne s'y est pas opposé. Suivant les principes reçus en cette matière, quand le débiteur qui paie n'impute pas lui-même son paiement, le créancier peut le faire, et le débiteur qui accepte la quittance faisant l'imputation sur une dette quelconque, quand plusieurs dettes sont dues, est censé avoir accepté cette imputation, quelque soit d'ailleurs la différence dans la nature des diverses créances. Ici, par son action, le créancier a fait l'imputation, le débiteur l'a acceptée en ne la contestant point, à une époque où la présente action était pendante, et le tribunal a sanctionné cette convention implicitement faite entre eux. En outre, par ce paiement, le Défendeur a eu crédit de la somme payée, et, si je faisais l'imputation qu'il réclame, je lui accorderais, pour cette somme, un crédit qu'il a déjà obtenu de la cour. Cette considération serait seule suffisante pour me faire décider contre lui la question d'imputation ; et appuyée de l'autre elle ne laisse dans mon esprit aucun doute que le loyer réclamé par le Demandeur lui est dû, c'est-à-dire, pour une période excédant trois années. La seconde question. Le bail du 9 juin 1845 a-t-il été un bail à loyer ou à ferme ordinaire; sinon est-ce un bail emphytéotique ? Un bail à loyer suivant les principes de notre jurisprudence ne transfère aucun droit réel. Pothier, *Louage*, n° 285 : " Le " droit du conducteur suivant la définition que nous en avons " donnée, n'est qu'un droit de créance personnelle qu'à le conducteur contre la personne du locateur ; c'est seulement *jus* " *ad rem.* C'est pourquoi la tradition qui est faite de l'héritage " du locataire ou fermier non seulement ne lui en transfère " pas la propriété *(non solet locatis dominium mutare)* mais " elle ne lui transfère aucun droit dans la chose, pas même la " possession de la chose ; elle continue d'appartenir au locateur." No 288 : " Des principes que nous venons d'établir résulte une " différence très grande entre le droit d'un locataire ou fermier " et celui d'un usufruitier, d'un emphytéote, etc. Le droit de " ceux-ci est un droit dans la chose qu'ils conservent, en " quelques mains que passe la chose. Au contraire, le locateur " ou fermier n'ayant aucun droit dans l'héritage qui lui a été " livré si le locateur a vendu ou légué cet héritage à quelqu'un " sans la charge de l'entretien du bail qu'il en a fait, cet acheteur, " ce légataire ne serait pas obligé de l'entretenir à moins qu'ils " ne l'aient approuvé, du moins tacitement." Un bail fait pour

plus de neuf ans n'est pas un bail à loyer, mais un bail à long terme qui conférait un droit immobilier. Pothier, *Louage*, nos 4-5. Troplong, *Louage*, sur l'art. 1799 du code civil, no 4, p. 74. De ce qui précède, il est évident que le bail en question fait originairement pour quinze ans et prorogé jusqu'au terme de vingt années, n'a pas été un simple bail à loyer. Il a été un bail à long terme. Mais dans quelle classe de baux à long terme ou à longues années doit-il être placé ? Notre loi ayant aboli le système féodal, et, par conséquent, le bail à cens, ne reconnaît aujourd'hui comme baux à long terme que le bail à rente et le bail emphytéotique. Sans entrer dans l'énumération des faits sur lesquels ces deux baux se ressemblent ou diffèrent l'un de l'autre, qu'il suffise de dire que le caractère particulier du bail emphytéotique et qui le distingue du bail à rente est de la part de l'emphytéote l'obligation d'améliorer l'héritage baillé. Le bail emphytéotique est un contrat par lequel le propriétaire le cède pour plus de neuf ans et pour pas plus de quatre-vingt-dix-neuf, à la charge par le preneur d'y faire des améliorations et de payer une rente annuelle, et moyennant les autres charges qu'on peut y stipuler. (1) D'après cette définition, il est évident que le bail en question fait pour vingt ans par le Demandeur au Défendeur d'un héritage que le preneur a promis d'améliorer à un montant de £400 à £600, moyennant une rente ou canon emphytéotique, variant de dix à quinze louis payable semi-annuellement, a été un véritable bail emphytéotique, auquel doivent s'appliquer les règles qui gouvernent ce contrat et sujet à résolution pour les causes prononcées par la loi. Touchons maintenant à la troisième question dont la solution nous sera comparativement facile. Pendant quatre années et demie, le Défendeur a négligé de payer sa rente ou canon emphytéotique. Or, rien de plus élémentaire en droit que le principe que le défaut de paiement de la rente ou canon emphytéotique, pendant trois années, emporte la résolution du bail, que le bailleur rentre dans la propriété de l'héritage et des bâtisses construites par le preneur, conformément à sa stipulation, et que ce droit de commise est de la nature du contrat, c'est-à-dire qu'il s'exerce sans stipulation à cet égard. Dans leur projet de codification, les commissaires en ont fait l'objet d'un article spécial. Voyez liv. 2e, tit. 5 de l'emphytéose, sec. 1ere, art. 8. (2) Le bail doit donc être résolu et le Défendeur déclaré déchu de l'immeuble en question et de ses améliorations. Vainement on objectera que, dans la présente espèce, le bailleur devant, à l'expiration du bail, payer £200 pour les améliorations, à son refus de le faire,

(1) V. art. 567-68 C. C.

(2) V. art. 574 C. C.

le preneur pouvait garder l'héritage et les bâtisses qu'il y construirait, moyennant le paiement de la somme de £600, et que l'acte en question a renfermé une promesse éventuelle de vente. Qu'importe cette circonstance ? Comme la plupart des contrats commutatifs, le bail emphytéotique est susceptible de toutes les stipulations qui ne répugnent pas à la nature, et ces stipulations, quelque inusitées qu'elles soient ne peuvent avoir l'effet de le soustraire à l'opération des règles qui lui sont propres. D'ailleurs, le fait que le bailleur, par anticipation, paya la somme de £200, stipulé au contrat originaire, n'impose-t-il pas un prompt silence à cette objection ? La résolution doit donc être prononcée, malgré que le bailleur n'ait pas mis le preneur en demeure de payer ? Cette demeure n'étant pas nécessaire, nonobstant ce qu'en dit le Défendeur. Dans aucun des auteurs qui ont traité de l'emphytéose, il n'est fait mention de la nécessité de cette mise en demeure. Je trouve même le contraire enseigné par les éditeurs du nouveau Denisart, vo. *Emphitéote*, vol. 7, p. 542, sec. 3ème, verset 2 : " Un des premiers engagements qui résultent de l'em- " phythéose à l'égard du preneur, est celui de payer le canon " ou la rente emphytéotique. Si l'emphytéote laisse écouler " trois années sans acquitter la redevance, il peut être expulsé " par le bailleur qui n'est pas même obligé de lui faire une " sommation de payer." La seule question qui reste, est de savoir, à quelles conditions la résolution doit être prononcée ? Doit-elle l'être purement et simplement, ou doit-on accorder un délai pour purger sa demeure. Il n'est pas douteux que le juge ait ce pouvoir d'accorder un sursis à l'exécution du jugement prononçant la résolution, avec faculté au preneur de payer pendant ce délai et de garder possession de l'héritage. Domat, *Lois civiles*, partie 2, livre 2, titre 4, sec. 10, no. 11, observe qu'il est de la prudence du juge selon la qualité des améliorations et des autres circonstances, d'accorder à l'emphytéote un délai raisonnable pour le mettre en état ou de payer et conserver le fonds, ou de pouvoir le vendre. Pothier, *Bail à rente*, no. 40, s'exprime ainsi : " A l'égard de l'autre objet " de l'action qui est de rentrer dans l'héritage à défaut de " paiement de la rente, le bailleur n'y est reçu que lorsqu'il lui " est dû plusieurs termes ; même en ce cas le juge avant des ta- " tuer définitivement a coutume d'ordonner que le preneur " sera tenu de payer dans un certain temps fixé par la sen- " tence, faute de quoi il sera permis au bailleur de rentrer. Il " y a plus ; même après que le bailleur a obtenu la sentence qui " lui permet de rentrer et qui condamne le preneur faute de " paiement, à quitter l'héritage, le preneur peut encore sur " l'appel, en payant tous les arrérages qu'il doit et en offrant " de payer tous les dépens, se faire renvoyer de la demande

" du bailleur et demeurer dans l'héritage. Je pense même que " quoiqu'il eût été condamné par arrêt à quitter l'héritage " *faute de paiement*, n'étant pas encore en ce cas condamné " purement et simplement, mais faute de paiement, avant que " l'arrêt soit exécuté, et que le bailleur soit rentré dans l'héritage, il peut encore en payant tout ce qu'il doit, ou en consignant sur le refus du bailleur, se conserver en la possession de l'héritage." *Dictionnaire de droit*, vol. 1, vo. *Emphytéose*, page 705 : " Faute de paiement de trois années de redevance, pour des biens appartenant à des particuliers, ou " faute de paiement de deux années, pour ceux qui appartiennent à l'église, le preneur peut être expulsé ; mais il faut " que le bailleur le fasse ordonner par justice, partie appelée, " à laquelle le juge doit donner la liberté de purger sa demeure ; sinon déguerpir." Cette doctrine équitable n'a rien d'exorbitant en droit. Elle est empruntée à la théorie des conditions qui ne s'exécutent rarement à la rigueur, sans accorder au débiteur un délai pour remplir son engagement. Le code Napoléon en contient un article particulier. L'art. 1184 porte : " La condition résolutoire est toujours sous-entendue " dans les contrats synallagmatiques, pour le cas où l'une des " deux parties ne satisfait pas à son engagement. Dans ce cas " le contrat n'est point résolu de plein droit. Le partie envers " laquelle l'engagement n'a point été exécuté a le choix ou de " forcer l'autre à l'exécution de la convention lorsqu'elle est " possible, ou d'en demander la résolution avec dommages et " intérêts. La résolution doit être demandée en justice et il " peut être accordé au Défendeur un délai sous les circonstances." En vertu du pouvoir discrétionnaire que la loi m'accorde et, sous les circonstances de cette cause, j'accorde deux mois de délai au Défendeur, pendant lesquels, en payant le capital, intérêts et dépens, il pourra conserver la possession de l'héritage, sinon déguerpir. " La Cour considérant que le bail fait par le Demandeur au Défendeur, le 9 avril, 1855, devant Weekes notaire, pour quinze années, et ensuite prorogé à vingt ans, par acte reçu devant le même notaire, le 22 juin de la même année, d'un terrain y mentionné, moyennant une rente annuelle de £10 et £15, à la charge d'y construire des bâtisses, au montant de £500 à £600 avec option au Demandeur de reprendre ce terrain avec les bâtisses en payant au Défendeur deux cents louis, option qu'il a depuis faite, en payant par anticipation cette indemnité au Défendeur qui l'a acceptée, a été un véritable bail emphytéotique, soumis aux règles qui régissent ce contrat, et sujet à rescision dans les cas pourvus par la loi, nommément pour défaut de paiement pendant trois ans de la rente ou canon emphytéotique. Considérant, que le défendeur a échoué dans

la preuve qu'il a tenté de faire, que la somme de £92 5s, mentionnée en son exception péremptoire, a été payée au Demandeur en accompte de cette rente ou canon emphytéotique sur les quatre années et demie de cette rente, échues lors de l'institution de l'action et que le Demandeur réclame; qu'au contraire il appert que cette somme a été imputée sur les billets et obligations, pour le recouvrement desquels le demandeur a obtenu jugement *ex parte* contre le Défendeur, imputation qui ayant reçu la sanction du tribunal, est revêtue de l'autorité de la chose jugée. Considérant, que, lors de l'assignation du Défendeur, il devait au Demandeur la somme de £56 8s, pour quatre années et demi de la dite rente ou canon emphytéotique, et pour redevances municipales dues sur l'immeuble baillé, redevances que le Defendeur s'était engagé de payer et qu'à son défaut le Demandeur a payées pour lui à la municipalité, et que, partant, il y a lieu de prononcer la résolution du bail emphytéotique du 9 avril, 1855, ainsi que de l'acte du 22 juin de la même année (bien que le Demandeur n'ait pas mis le Défendeur en demeure de payer, laquelle demeure est encourue de plein droit), en accordant cependant au Défendeur un délai raisonnable, pendant lequel, en payant le montant de la condamnation qui va être prononcée contre lui, en principal, intérêt et dépens, il pourra purger la demeure. A débouté et déboute les défenses du Défendeur; et, faisant droit sur la demande, condamne le Défendeur à payer au Demandeur la dite somme de £56 8s, avec intérêt sur icelle à compter de ce jour, et les dépens, avec un délai de deux mois, pendant lesquels, en payant la dite somme de £56 8s, avec intérêt et les dépens à être mis en taxe, il conservera la possession de l'héritage à lui baillé et des bâtisses dessus érigées; sinon, et ce délai expiré, faute de paiement, déclare résolus, annulés et mis au néant le bail du 9 avril, 1855, ainsi que l'acte du 22 juin de la même année, casse, annulle et met au néant les dits actes, et condamne le Défendeur à déguerpir et abandonner la possession et jouissance du dit héritage et des bâtisses au Demandeur, comme en étant le propriétaire incommutable, sans autre délai ou demeure que la signification de la présente sentence, et, à défaut par lui de ce faire, sera le Demandeur mis en possession du dit héritage et des bâtisses et le Défendeur expulsé sous l'autorité de la présente sentence, en la forme et suivant la procédure usités devant cette cour. (8 *J.*, p. 197.)

MOREAU, OUIMET et CHAPLEAU, avocats du Demandeur.

DOUTRE et DAOUST, avocats du Défendeur.

LIFE INSURANCE.—FALSE STATEMENTS.

SUPERIOR COURT, Montreal, 12th January, 21st March and 14th October, 1863.

Coram MONK, J., before a jury and in banco, and the 30th November, 1863, Coram BERTHELOT, J., in banco.

HARTIGAN *vs.* THE INTERNATIONAL LIFE ASSURANCE SOCIETY.

Held: 1o. That where an applicant for Life Insurance, in answer to printed questions mis-states his age, or declares that his health is good, whereas it is bad, or fails to disclose the name of medical attendants, though he had them, and answers as if he had none, and upon such answers, which are made to form a part of the contract, a policy is issued by the insurer, such policy is void.

2. Generally that false statements made by the applicant for Insurance absolutely void the policy. (1)

3. That parol testimony of age will not be admitted until the non-existence of baptismal registers has been proved.

This was an action brought by Plaintiff, as widow of the late *Roger Finn*, and as *commune en biens* with him, claiming from the Defendants $1300, as for damages suffered by the non-payment by Defendants to Plaintiff of one half of a policy of insurance on Finn's life for $2600. This policy was issued by the Society, on a proposal and declaration made by Finn on the 15th June, 1858, containing *inter alia*, the following particulars: In answer to the question 4, as to his age next birth day, Finn said "30 years." The question 6, "Is he temperate in eating and drinking," was answered "temperate." The question 11, "Has he had asthma, shortness of breath, spitting of blood, "continued cough or any sign of consumption," and the question 12, "Has he had gout, aguish complaint, scrofula, skin disease, rupture, or any other disease?" and the question 13, "Have his parents, or any of his near relatives, had consumption, or any of the preceding diseases? or has the person's life been in danger from any disease?" were severally answered "No," The question 18, "Name and residence of the usual medical attendant, to be "referred to for similar information, and how long has he "known the person; if no medical attendant, name the resi- "dence of a second intimate friend?" was answered, "J. F. Bradshaw, Esq., Quebec, has known him 10 years." Under the questions, 24 in all, and answers to them, was subscribed by Finn the following declaration: "I do hereby declare that the age of Roger Finn, the above named, does not now exceed thirty years; that I am now in good health, and do ordinarily enjoy good health, and that, in the above proposal, I have not

(1) V. art. 2485 C. C.

withheld any material circumstance or information touching the past or present state of health, or habits of life of myself with which the Directors of the International Life Assurance Society ought to be made acquainted. And I do hereby agree that this declaration and the above proposal shall be the basis of the contract between me and the said Society; and that, if any untrue allegation be contained herein, or be made with respect to this proposal, all moneys which shall have been paid on account of such insurance shall be forfeited to the said Society, and the policy void." The policy bore date the 22nd June, 1858, and made the above proposal and declaration the basis of the contract between Finn and the Society, in the following words: After reciting that Roger Finn had proposed to effect assurance, and had delivered the said declaration to the Society, "thereby agreeing that the said declaration, together with the proposal therein referred to, should "be the basis of the contract between himself and the Society." The policy further contained the following proviso, "provided "always that, in case any fraudulent or untrue allegation be "contained in the said recited declaration, or in the proposal "therein referred to, or in any of the testimonials or documents addressed to or deposited with the Society in relation "to the said assurance, then this policy shall be void, and all "moneys paid thereunder shall be forfeited to the Society." One of the conditions endorsed on the policy was as follows: "The Society will in all cases require proof of the age of the "person whose life is assured before payment of the policy, "unless that fact shall have been previously ascertained and "admitted by endorsement on the same." The annual premium of $53.50 was payable half yearly. The first instalment of $26.75 was paid at the time of the execution of the policy, and a second instalment of $26.75 on the 22nd January, 1859. Roger Finn died on the 9th March, 1859. The declaration of Plaintiff in the suit set up the quality of Plaintiff, the policy, the payment of premium, the death, and expressly averred: "That the said declaration, so made by Roger Finn, and re-"ferred to in the policy, was in all respects true, to wit, at "Montreal on the 22nd day of June, 1858." The Defendants met the action by the following pleas: 1. That the condition of the policy requiring proof of age before payment, if the age had not been previously ascertained and endorsed on the policy, had not been complied with before action brought, and that the age had not been proved or admitted, and, therefore, Plaintiff's action could not lie. 2. That Finn, when he agreed with the Company for the policy, warranted that his age did not then exceed thirty years, whereas in fact it was thirty-three and upwards. 3. That the following question was

put to Finn on his proposal for insurance: 11 "Has he "(meaning Finn) had asthma, shortness of breath, spitting of blood, continued cough, or any sign of consumption?" and said question was answered by Finn in the negative, which answer was untrue, and Finn then knowingly disguised and concealed his true state of health. 4. That Finn gave the same negative answer to questions 12 and 13 as follows: "Has he (meaning Finn) had gout, aguish complaint, scrofula, "skin disease, rupture, or any other disease? Have his "parents, or any of his near relatives had consumption, or "any of the preceding disease? or had the person's life been "in danger from any disease?" to both of which the answers were untrue. 5. That, in reply to question 18, Finn concealed the fact that he had been attended by a medical attendant, and that his declaration was false and untrue in the foregoing and other particulars, and the policy thereby void. The following questions were put to the jury, who tried the case on the 12th January, 1863, and their answers are appended: 1. Was Roger Finn duly and legally married to Plaintiff, on or about the tenth day of July, 1854, and was there a community of property existing between Finn and Plaintiff, and, after the death of Finn did Plaintiff accept the same? Answer — Yes. 2. Did Defendants, by their duly authorized attorneys, on or about the twenty-second day of June, 1858, execute and deliver to Finn the Policy of Insurance in Plaintiff's declaration mentioned, whereby the life of Finn was declared to be insured for $2500, during the whole continuance thereof, and did Finn, prior to the effecting of the Insurance by Defendants, make, sign and deliver to Defendants the proposal for assurance and declaration mentioned and referred to in the policy, as also the written answers to the printed questions contained in the proposal, and did Finn, on or about the twenty-second day of December, 1858, pay to Defendants the premium of $26.75, the half-yearly premium as due under the policy? Answer — Yes. 3. Did Finn, when making the said proposal and declaration, on or about the 15th of June, 1858, at the city of Quebec, represent to Defendants that his age did not exceed thirty years, and, if so, would the age of Finn, on his first birth-day after the 15th day of June, 1858, have been thirty years? If not, what would it have been? Answer — No intention of fraud, there being no proof of age. 4. Was proof of the age of Finn, at any time before the institution of the present action ever made to Defendants by Plaintiff, in conformity with the conditions of the policy, or was his age ascertained or admitted by endorsement on the Policy by the Defendants? Answer — No. 5. At the time of making the

said proposal and declaration, on or about the 15th of June 1858, or at any time previous thereto, had Finn had disease of the lungs and attacks of illness occasioned thereby, or any sign of consumption, or had the life of Finn been in danger from any disease prior to his making the said proposal, answers and declaration, and of what disease did Finn die and when did he die? Answer — We can only be guided by the evidence of the medical officer of the Company, who gave him a certificate of good health. 6. Did Finn, at the time of making the said proposal, withhold the name of his usual medical attendant or attendants, and had Finn, on or about the said 22nd of June, 1858, or at any time previously thereto, at Quebec, had the services of a medical attendant or attendants who acted for him as such? Answer — Dr Russell says, in his evidence, that he was his family physician, but we have no evidence of his being under medical treatment when he applied for the policy or previously. 7. After the death of Finn, was satisfactory proof produced to Defendants by Plaintiff of the death of Finn? Answer — Yes. The Defendants complained of the finding of the jury as being wholly unsupported by, and contrary to the evidence, and made three several motions before the Court *in banco*. 1. A motion in the alternative form for judgment dismissing the action, inasmuch as the verdict was contrary to evidence, and, in the event of the Defendant not being entitled to have the action dismissed, that a new trial be granted. *Higginson* vs. *Lyman* (1). 2. A motion that the verdict giving the answer to the third question be set aside, and that judgment be entered up in favor of Defendant, and Plaintiff's action dismissed. *Grant* vs. *Ætna* (2).

(1) Une motion, par laquelle le Défendeur demande que le verdict du jury soit annulé et l'action du Demandeur renvoyée, ou qu'un nouveau procès lui soit accordé au cas où il ne réussirait pas à faire annuler le verdict et renvoyer l'action, est régulière et conforme à la pratique de la cour. La cour supérieure a droit d'apprécier la preuve faite devant le jury, d'annuler sur motion le verdict s'il est contraire à la preuve et de rendre jugement en conséquence. (*Higginson* vs. *Lyman et al.*, C.S., Montréal, 27 novembre 1860, MONK, A. J., *in banco*, 8 R. J. R. Q., p. 281.)

(2) Le 30 juillet 1858, G fit assurer contre le feu, pour l'espace de douze mois, par la Compagnie d'Assurance Ætna, un bateau à vapeur lui appartenant et décrit dans la police "comme étant maintenant dans le bassin de "radoub de Tate, Montréal, et destiné, principalement comme bateau à "transporter le fret, à naviguer sur le Saint-Laurent et les lacs, de Hamilton "à Québec, et être placé pendant l'hiver dans un endroit approuvé par la "compagnie." Le 25 juin 1859 ce bateau, qui, depuis l'exécution de la police d'assurance, n'avait pas laissé le bassin de radoub de Tate, fut consumé par le feu. La compagnie ayant refusé de lui payer l'indemnité mentionnée en la police, G, le 7 octobre 1859, la poursuivit lui réclamant cette indemnité. La cause fut jugée par le jury et un verdict rendu en faveur du Demandeur. Le 20 février 1860, les Défendeurs présentèrent, en cour supérieure, une motion pour faire annuler le verdict et rejeter l'action. Le 31 mars 1860, la cour Supérieure (BADGLEY, J.) rendit jugement accordant la motion des Défen-

Tilstone vs. *Gibb* (1). *Racine* vs. *Equitable* (2). 3. A motion for a new trial, because the verdict was without evidence and against evidence, and because the charge of the honorable judge presiding at the jury trial was wrong in referring to the private certificate of Dr. Fremont, the medical referee of Defendant, as evidence to be weighed against the sworn testimony of other witnesses. The court (S. C., MONK, A. J.) by judgment of date, 31st March, 1863, ordered a new trial, which accordingly took place on the 14th October, 1863.

Mr. Kerr opened the case for Plaintiff. The insurance was effected by Roger Finn, master shœmaker, of Quebec, on the 22nd June, 1858, for the sum of $2,500. Finn paid the premium of $26.75 ; also a second premium on the 22nd December, 1858 ; but, before the third became due, he died, in March, 1859. According to the laws of Lower Canada, a community having existed between Finn and his wife, the present Plaintiff, she was entitled to one-half this amount, the other half belonging to the children and the heirs. The Plaintiff having failed to obtain the money from the company, after waiting over two years, at length instituted the present action. The Defendants pleaded that the deceased had made an erroneous statement as to his age ; that he had concealed the facts of his being attended by a medical man ; and, further, that, at the time of effecting the insurance, he was in a bad state of health, which circumstance he did not disclose to the officers of the company. The case had already been brought before a jury, and they had found in favor of Plaintiff. A motion had then been made by Defendants for a new trial, and this application had been

deurs. Sur appel, la cour du Banc de la Reine (LAFONTAINE, juge en chef (dissident), AYLWIN, MONDELET, DUVAL et MEREDITH, juges) confirma ce jugement le 3 juin 1861. Sur nouvel appel, le conseil privé, le 1er juillet 1862, a infirmé le jugement de la cour du Banc de la Reine, jugeant que, comme il était évident que l'Appelant avait déclaré, de bonne foi, son intention de satisfaire aux conditions de la police, cette dernière n'était pas nulle, la clause de la police ci-dessus citée ne contenant aucune condition expresse ou garantie que de fait le bateau serait employé à la navigation. (*Grant* et *The Ætna Assurance Company*, 9 *R. J. R. Q.*, p. 290).

(1) Une motion, par laquelle le Défendeur demande un nouveau procès, parce que le juge aurait omis de donner des instructions concernant l'imputation de certains paiement en question dans la cause, doit être accordée. (*Tilstone et al.* et *Gibb et al.*, C. B. R., Québec, 19 juin 1860, LAFONTAINE, juge en chef, AYLWIN, DUVAL, MONDELET et BADGLEY, juges, infirmant le jugement de la Cour Supérieure, Québec, 1 juin 1860, CHABOT, J., 8 *R.J.R.Q.*, p. 374).

(2) La condition d'une police d'assurance, exigeant un certificat de trois personnes respectables, qu'elles croient que la perte n'a pas été occasionnée par fraude, doit être exécutée avant que l'assurance soit exigible. (*Racine* vs. *The Equitable Insurance Co. of London*, C. S., Montréal, 12 et 14 octobre 1861, MONK, J. et le jury, et 30 décembre 1861, BERTHELOT, J., *in banco*, 10 *R. J. R. Q.*, p. 185).

granted by Mr. assistant Justice MONK. The signature of Dr. Fremont, the medical referee (since dead) to the certificate was admitted to be genuine. An extract of the burial of deceased on the 11th March, 1859, was read to the jury. (Previous to the former trial most of the witnesses had been examined by a commission at Quebec. On the present occasion, with the exception of Dr. Russell, they were brought up to give their testimony orally before the jury, as suggested by the judge at the time of granting the new trial.) Mr. Kerr proceeded to call the witnesses on the part of Plaintiff. Jane Keane, Mrs. Clancy, deposed: I knew Roger Finn, of Quebec, from the time of his boyhood. Witness being asked if she knew his age, M. Torrance, for Defendants, object to the adduction of parol testimony as to the date of deceased's birth, until the absence of the baptismal certificate should have been proved. It was well established that secondary evidence should not be received till it was shown that primary evidence was wanting. Mr. Kerr differed, contending that it was a generally recognized principle that verbal evidence should be received to establish the date of birth. Mr. Torrance cited the ordinance of 1667, tit. 20, art. 14, and also the consolidated statutes, Lower Canada, cap. 20, sec. 13, to show that it must first be proved that the registers of birth, &c., do not exist. Mr. Kerr referred to Taylor on evidence, §§ 386, 578, to show the admissibility of parol evidence. The court held that it must first be shown that the register of the birth did not exist. Witness resumed that she knew deceased at Carrick on Shannon, in Ireland, when he was only four or five years old. She believed there was no register of births kept. Knew him until 1841, when he left Ireland. He was then only 12 or 14 years of age. She did not recollect the year in which he was born. Knew him at Quebec up to the time of his death. Witness came out to this country in 1854, and was in the habit of seeing Finn constantly. Never heard him complain of bad health till three or four months before his death. Witness referred to his likeness, but could not say how long before his death it was taken. Cross examined. "To the best of my belief there was no register kept in the church in Ireland where deceased lived. My ground for supposing this is my knowledge that the priest was applied to for affidavits in several cases. Never met a doctor in Mr. Finn's house; never inquired, and never heard that he had a doctor. Am almost confident that the priest in Carrick, where deceased was born, never kept a parish register. Am now forty-two or forty-three. Was born at Carrick on Shannon. Was acquainted with the mother of Roger Finn, and was in the habit of seing the children every day. Do not think I could be mistaken as to the fact that deceased was only twelve

or fourteen years old in 1841 when he left Ireland. He was a stout healthy boy of his age." James H. Oakes: "Knew Roger Finn, was baptized in Carrick, in the episcopal church. Remember Roger Finn, when a boy, in Carrick on Shannon. Knew him two years previous to 1841. To the best of my belief he then appeared to be between twelve or fourteen. I have no knowledge as to the existence of a register in the parish church at Carrick on Shannon. I believe there was none." Cross-examined, "cannot say how old Finn was when I first saw him. Shortly before his death, he was suffering from what I thought was a bad sore throat. He had a cough. In 1858, he, once or twice, complained to me that he was not well. He did not mention to me the name of any medical attendant. On one occasion he called at my house, and there was a person with him called Dr. Tumblety. I think he mentioned that he had met Dr. Tumblety in Montreal by accident, and the doctor had informed him that his lungs were affected. To the best of my belief this was in 1858, in the early part of summer. Finn never mentioned any particular ailment to me; I understood him to complain of his health generally. I think he told me that his widow would be in the receipt of $12 per month in the event of anything happening to him. I understood him to refer to an insurance recently effected, and felt surprised because I thought the state of his health at this time was such as to prevent an insurance company from accepting him. This was shortly before his death in the winter of 1858-9. He died in March, 1859. To the court, my sole guide in judging of his age was his appearance, his voice, and his manner." Francis B. McNamee: Knew Finn from about the year 1850 up to the time of his death. Saw that his health was delicate for some time before his death. Witness was born in Carrick, in Ireland. There was no such thing then kept as a register of births. Witness was sure of this. Edward Hartigan: "Am father of Plaintiff, the widow of Roger Finn. I stated the age of Roger Finn at the time of his funeral to the priest. I could not ascertain his exact age, and mentioned thirty-three to the priest as an approximation. Until, on one occasion, deceased fell into the river while travelling between Montreal and Quebec, I believe he was a sound man. He met with this accident about four months before his death. The likeness produced in court was taken about two months before his death." Cross-examined, "Made the acquaintance of deceased three or four years previous to his death." This was the case for the Plaintiff.

M. Torrance proceeded to address the jury on the part of Defendants. After stating the manner in which the action had arisen, he commented upon the importance of Insurance

Associations to society, and the necessity which existed that both parties to the contract should preserve good faith. The aggregate amount of life assurances was exceedingly large, but disputed claims had seldom come before the courts, because the Insurance Companies had seldom had anything to complain of. But he believed he should be able to make it quite apparent to the jury that this was a claim which the company were quite right in resisting. They were, in fact, bound to do so, for the protection of others who had insured with them. The law required the insured to state all the circumstances relating to his health in the most open and candid manner, and the slightest deceit on his part made the policy void. The reason of this was evident. Insurance companies could not be supposed to know the ailments and infirmities of those who applied to them for insurance. It was necessary, therefore to afford them the information which would enable them to make a fair bargain. The insured was also required to give the name of his usual medical attendant, and, in default of a medical attendant, of his most intimate friend. This practice was also founded upon the same common sense view that they must be put in possession of all the information necessary to enable them to enter into the contract without being at a disadvantage. In the present case, Roger Finn had been in a very delicate state of health for several years before his death. He (Mr. Torrance) would produce two of the most eminent and skilful physicians of Quebec to testify to Finn's condition. One of these, Dr. Russell, had been Finn's medical attendant for ten years before his death. The other, Dr. Marsden, was president of the College of Physicians and Surgeons at Quebec, and was a gentleman of the highest standing in his profession. Finn came to Dr. Marsden, and stated that if he would give him a certificate, he could get his life insured. Dr. Marsden, at his request, made a careful examination, and found that his lungs were so far affected that he could not give him a certificate. This was in October, 1857. Dr. Marsden stated, however, that, as he was not the medical referee of the International, and as he did not wish to injure him, he would do nothing more, but allow him to try elsewhere, though, at the same time, he informed him that any medical man who made an examination of his chest, and knew what he was about, would not pass him. In March, 1858, Finn came back to Dr. Marsden, and desired him to make another examination, but this showed that the disease, tubercular consumption, was making steady progress, and that it was only a question of time how long he should live. Dr. Russell, who had been Finn's medical atttendant for ten years, had also made an examination, and with the same result. Nevertheless, with this know-

ledge, Finn had subsequently gone to Dr. Fremont, the medical referee of the International, and, as it afterwards appeared, by deception had succeded in getting a favorable certificate without undergoing any examination. There were three points to which he (Mr. Torrance) would more particularly call the attention of the jury. 1st, Finn mis-stated his age, informing the officers of the company that he was only 29, whereas he was 32. 2nd, he concealed the fact that he had a medical attendant, and 3rd, he concealed the bad state of his health. He was asked whether he had ever been troubled with asthma, shortness of breath, spitting of blood, &c.; and he answered, No. He was asked whether he had any disease whatever; and he again answered, No. He was asked whether any of his relatives had died of consumption, &c.; and he answered, No, notwithstanding his previous avowal to Dr. Marsden, that one of his brothers had died of consumption. He was asked the name of his medical adviser. But he kept back the fact that Dr. Russell was his medical attendant, and that he had consulted Dr. Marsden, and referred to the late Mr. Bradshaw, cashier, Quebec Bank, as his second most intimate friend. Mr. Bradshaw merely stated that he had known him for ten years. In his declaration, the statements of which were the basis of the contract, he alleged that he had concealed no material circumstance. Now the mere fact of there being error in this declaration rendered the policy void. It was not necessary that fraud should be established, though he (Mr. Torrance) believed that this was a case of most disgraceful fraud. After getting his policy, Finn met Dr. Russell in the street, and said he had got his insurance. Dr. Russell, in a jocular way, mixed with some indignation, recommended him to go back and get the amount doubled for the sake of his family, as it would soon have to be paid. Some time after, Dr. Marsden again examined him, at the request of Mrs. Finn, and found unmistakable signs of disease. The man declined from day to day, and died some months after the insurance had been effected. The first plea of the company was that the man had misstated his age. He (Mr. Torrance) would undertake to say, on behalf of his clients, that, though the age was an important point, yet, if deceased had stated the other points correct, the company would not have disputed the claim on account of the error in age. Deceased stated his age next birthday to be thirty whereas it was really thirty-three. Mr. Torrance also contended that the action had been brought before the executors of deceased had informed the company as to his age. His Honor observed that the court had already held that it was the duty of the Plaintiff to establish the age of deceased in a satisfactory manner. In fact it was one of the grounds

for granting a new trial, that the age was not clearly made out. This point, therefore, need not be referred to, but his Honor desired to hear counsel on the question as to what constituted a medical attendant. Mr. Torrance cited authorities to the effect that the phrase "usual medical attendant" meant the person who was best acquainted by experience with the health of the insured at the time the policy was effected. He also referred to Reynolds on Life Assurance as to the que of referring to a medical attendant. If there was any misr sentation on this point, the policy might be avoided. Parsons, *on Mercantile Law*, was cited to the same effect. A mere consultation with a medical man in fact constituted the physician a medical attendant. The object of putting the question respecting a medical attendant was to enable the Company to obtain information which would put it in a position to make a fair bargain. Several other authorities were cited to the effect that the omission of the insured to mention the person under whose care he had last been was fatal to the validity of the policy.

The witnesses for the defence were then called: J. B. E. Chipman: Was agent of the International Assurance Company in 1858-9 for the British Colonies, and was notified of the death of Finn. No proof was made of the age of deceased. No baptismal certificate was produced. There is no endorser of the age on the policy produced. The premium of insu is of course heavier for an older person, other things being equal. Dr. Wm. Marsden: Am President of the College of Physicians and Surgeons of Lower Canada. Have been referee to Insurance Companies, and have also examined persons who have applied to me. Am in the habit of carefully examining the whole body. Knew the deceased for eight or ten years before his death. I attended him occasionally. In 1853, I was for a short time the medical attendant of Finn and his wife, and prescribed for them. On the 3rd Oct., 1857, I again attended him. He stated that he wished to have his lungs examined as he had doubts of their healthy condition. He wished to have his life insured. He said he had been attended both by Dr. Russell and a certain Dr. Tumblety. He said he had been prescribed for by Tumblety and Dr. Russell. I asked him why he did not go to Dr. Russell for the certificate, and he stated that he had had some quarrel with him. I examined him with great care, using the stethoscope. After the examination, I told Mr. Finn that I was sorry I could not recommend him for life assurance; that I was medical referee for several companies, but, as he had not come to me from any of those companies, but simply to obtain my opinion, for which he paid a fee, he might apply to any company for which I was not referree; but I

told him not to come to me, as I would have to reject him. I further told him that I believed he would be rejected by any referree who was well up in his profession and made an examination. I also questioned him as to the hereditary tendency to consumption in his family. He told me that he had one brother who had died in Ireland, and another in Montreal. He was not sure that they had both died of consumption, but one, he believed, had. The physical signs I noted in my memorandum book were, pulse 84 ; respiration 29 (this was high); dry cough, more troublesome in the morning, difficulty of breathing after unusual exertion. Part of lung dull on percussion, &c. Seems to be in the second stage of tubercular consumption. Height 5ft, 6in. Chest nearly 32 inches. Has been attended by Dr. Russell. He had been complaining of coughing, hoarseness. irritation of the throat, indicating laryngeal disease. I do not think there was at that date any tubercular softening, inasmuch as there was little or no expectoration. There are three stages of consumption, and he was then, in Oct., 1857, in the second stage. I do not believe that he had the slightest doubt as to his condition, as I did not wish to deceive him, and told him that he would not get his life insured by any gentleman who knew what he was about. Either at this time, or on the 29th March, 1858, when he came for another examination, he appeared more sanguine, owing to his believing that something which Dr. Tumblety had given him was doing him good. My impression was that before he came to me he had been told by Dr. Russell something like what I had told him with reference to his position. He was of such a lively, active disposition, that he did not sink so soon as another of of a different temperament would have done. Finn called on me again on the 29th March, 1858. I examined him again with the same care as before. The disease was progressing, and I advised him to abandon the idea of getting his life insured. The doctor here detailed the symptoms, such as increased expectorations, cough, night sweats, &c. About three months after this, I heard that Finn was insured, and was perfectly astounded. I could not believe it. On inquiry I found that the report was correct. Many of the friends and acquaintances of Finn were also surprised, as it was a matter of notoriety that he was consumptive. On the 12th November, 1858, I was sent for by his wife who requested me to examine him again, which I did. There was hurried respiration, pulse more frequent, &c. He was then in fact beginning to break up, and it was only through his great energy and sanguine temperament that he lived as long as he did. I believe there was no *post mortem* examination made. A *post mortem* would have been of great value in establishing beyond cavil the cause

of death. It is my impression that he told me he had been getting medicine from Dr. Tumblety. The J. F. Bradshaw, mentioned in the proposals as the second intimate friend referred to by deceased, is dead. He was a banker, and never was a doctor." *Cross-examined.* "I came to know about this case as follows. I was sitting in Dr. Russell's surgery, when a gentleman, a Mr. Oxley, came in, and there was some conversation on the subject of Roger Finn's death. I told the gentleman that he had been to me two or three times on the subject of insurance, and I had refused to recommend him. I was not then aware that Mr. Oxley was one of the officers of the Company; I did not divulge anything respecting deceased till the subject of insurance was started. I cannot say that the symptoms I observed were infallible, the only real infallible test of existence of disease is the examination of the body after death; nevertheless, if a person, in Finn's state of health, had recovered, I should have considered it miraculous, and should have set myself down as extremely ignorant of my profession. I never heard of a case of recovery from the second stage of consumption, though such may have occurred. I never talked to Dr. Russell about this case, having purposely avoided the subject. Knew Dr. Fremont, who was the medical referee. Dr. Fremont told me that Finn deceived him; Finn had come to him, and clapped his chest, and his lively manner imposed on Dr. Fremont, who passed him without examination. He had been to him once before; the first time, he was a little feverish, and Dr. Fremont thought he had been dissipating. But the second time, he came, Dr. Fremont passed him without examining his chest. Fremont introduced the subject to me himself; he was very sorry for his mistake. It was the subject of general conversation among the medical profession at Quebec. Dr. Fremont went to the office of the Company and told them they should return the money, as the insurance had not been properly effected. A person in apparent health might sink as rapidly as Finn did. The time a person takes to die of tubercular consumption is so various, that I cannot assign any particular time. A brother of Finn died afterwards much more suddenly, because he was exposed. The time depends on clime, temperament, and the care taken of the person. I can swear that Finn had the disease of which he died when I examined him five months before his death. The prescription which Dr. Tumblety gave him was good; it contained some of the ingredients generally used in such cases." *To a juryman*: "Deceased told me that his age was 32, in 1857." *To the Court*: "Deceased complained a little of his chest. The signs were most unmistakable when I examined him. I did not attend him in his last illness, and did not see him after his death."

The evidence of Dr. Russell, taken at Quebec on the 9th January, 1863, by consent of the parties, was then read to the Jury. It was to the following effect: "Knew deceased well for nine or ten years, and attended him in his last illness. He died of organic disease of the lungs. About five years before his death I told him his lungs were affected; I told him that, unless he was more temperate and took great care, he would shorten his days. Two or three years before his death,he asked me to give him a certificate, that he might get his life insured. I refused, after making an examination, as his lungs were affected. He repeated the request several times, and at last told me one day that Dr. Fremont had passed him. I said he had better, for the sake of his family, go back and get the amount doubled, as he had not long to live." M. Kerr here requested that Dr. Fremont's certificate be read to the jury. M. Torrance objected to the certificate as not legal evidence. The certificate was a falsehood, as Dr. Marsden had shown. He had a right to keep this paper from the jury. Cited Taylor, on evidence, to show that the certificate was an unsworn statement of a private individual, and would, therefore, be rejected. Greenleaf to the same effect. His Honor was of opinion that, whether the certificate was legal evidence or not, it must go to the jury, under the direction of the Court as to its value. The certificate was then read. It stated the chest to be well developed, sounded all over on percussion, no reason to suspect any affection of the chest, &c.; and recommended the acceptance of the proposal. *Dr. Howard:* "Am referee of the Scotch Life Association, and of the Mutual; have examined many applicants. Have heard or read all the statements made by Dr. Marsden. I have no doubt that the disease from which Finn at that time was suffering was pulmonary consumption. His life was not insurable at that time." *Cross-examined:* "There is a general unanimity, among the members of the Medical profession, as to the diagnosis of consumption. I have no doubt, from Dr. Marsden's reports of the gradual progress of the disease, that Finn died of consumption. The symptoms were a proof of the existence of disease, even if Finn had not died. Persons sometimes recover from organic disease."

His Honor then charged the jury: 1st. With reference to age, His Honor felt satisfied that the deceased made an erroneous statement of his age, perhaps not fraudulent. He stated to Dr. Fremont that he was thirty-two, instead of twenty-nine, as it was now pretended. His Honor felt bound to say this, but it was for the jury to weigh the evidence carefully. Mrs. Clancy, the first witness, merely said in her opinion he was twelve or fourteen at a particular time. Oakes testified to the same effect. The Court felt bound to say that

Plaintiff had not satisfactorily established the age of deceased, as she was bound to do. Next, as to the question of a medical attendant. It was proved that Dr. Tumblety was treating deceased, and, in this treatment, Dr. Marsden entirely concurred. Whether he had any disease, or not, it was evident that deceased had three medical attendants, Dr. Tumblety, Dr. Russell, and Dr. Marsden ; yet, he declared that he had no medical attendant. The jury must, therefore, if they believed Dr. Marsden's testimony, state that he concealed this fact. It was for them, however, to weigh the evidence carefully. But, as to the third question, whether deceased had organic disease of the chest, they had the evidence of Dr. Russell and of Dr. Marsden. But His Honor thought there was no positive evidence as to the disease of which the man died. The only legal evidence of the cause of death would be a *post mortem* examination. It might be said, therefore, that we had no legal evidence of the cause of death. He might have died of apoplexy, or disease of the heart, for all we knew. His Honor attributed some weight to the certificate of Dr. Fremont, though it was not sworn to ; but it could not be taken to be of the same weight as the sworn evidence of two medical men. It appeared to the court, therefore, that the balance of evidence was against Plaintiff. His Honor felt bound to express this *opinion*, leaving the jury to decide on the degree of credibility to be attached to the evidence. If they believed the statement of Dr. Marsden (whom His Honor entirely exonerated from the charge of making any revelations inconsistent with the character of a medical adviser), the jury must find for the Defendants.) The jury came into court with a verdict in favor of Defendants on all the material points. The same questions which were put to the first jury were put to the second. The following are the findings : *To the first question :* Answer.—*Yes. To the second question :* Answer.—*Yes. To the third question :* Answer.—*Roger Finn represented himself to be of the age of thirty years next birthday, but we find no proof of his age. To the fourth question* : Answer.—*No. To the fifth question :* Answer. —*Yes ; and he died of consumption, in the month of March, 1859. To the sixth question ;* Answer.—*Yes. To the seventh question :* Answer.—*Yes.* Subsequently on the 30th November, 1863 (BERTHELOT, J.), judgment was on the findings entered up in favor of Defendants. (8 *J.*, p. 203.)

Authorities cited by Plaintiff. 1. That verbal testimony is sufficient to prove age : Taylor, Evidence, § 386, p. 360 ; §578, p. 507. That the materiality of disclosing all information required by the Insurer from the applicant for insurance, is a question for the jury. *Morrison* vs. *Muspratt*, 4 Bing., 60.

Authorities cited by Defendants. 1. *Onus probandi :* Should any dispute arise upon the death of the assured as to the correctness of the statements made in the declaration, the burden of proof, it is said, will fall upon the Plaintiff, with whom it will rest before the insurers are required to produce any evidence to impugn such statements, to make out by evidence their truth, which is in fact the basis of the action and a condition precedent to any right to recover upon the policy. Bunyon, p. 66 ; Angell, on Insurance, § 309. 2. *General Doctrine of Warranty.* The effect of a stipulation amounting to a warranty is to render the accuracy of the state of facts alleged in it a *condition precedent* of the insurer's responsability, and he becomes bound only " if " and in event that they are literally a the assured has thus represented them to be. Angell, Ins., § 307. The same principle in life as in fire policies. Angell, § 353 ; 2 Greenleaf, Ev., § 409. 3. *Warranty in proposal as forming part of the policy :* The party proposing the insurance having first signed a declaration * * * agrees that such declaration shall be the *basis of the contract* between himself and the Company. *Shaw* and *Ellis*, p. 189. This declaration when forming part of the policy amounts to a condition or warranty which, as before observed, must be strictly true or complied with, and, upon the truth of which, whether a misstatement be intentional or not, the whole contract depends. *Shaw* and *Ellis*, p. 205. As to temperance, where the declaration affirmed that the assured was of intemperate habits, proof that the habits were in fact intemperate was held to avoid the policy, and the plea was bad that his habits were not so intemperate as to injure his health, and that he died from a malady uninfluenced by habits of intemperance. The statement was a warranty. Bunyon, p. 40. *False statements absolutely void the policy :* This point was fully considered in a leading case, *Anderson* vs. *Fitzgerald*, in the House of Lords, in which the house held with the unanimous advice of the judges of England, that the only questions to be left to the jury were : 1st. Whether the statements were false and, 2nd, whether they were made in obtaining the policy. English Law and Equity Reports, vol. 24, p. 9. In which case Parke, B., delivering the opinion of the judges to the house, said : " The " proviso is clearly a part of the express contract between the " parties, and on the non-compliance with the condition " stated in the proviso, the policy is unquestionably void : " and the Lord Chancellor, delivering judgment, said : " Whe- " ther or not certain statements are or are not material where " parties are entering into a contract of life assurance, is a " matter upon which there must be a divided opinion.

"Nothing can therefore be more reasonable than that the "parties who are entering into that contract should say for "themselves whether they think any thing material or not; "and if they choose to do so, and stipulate that unless the "assured answers a certain question accurately the policy or "contract they are entering into shall be void, it is perfectly "open for them to do so. Now it appears to me, my Lord, "that that is precisely what the Company have done here. "They have said: "The basis of our contract shall be your "answering truly these two questions." There were a great "many others, but putting these aside they say: "The basis "of the contract between us shall be that you shall answer "truly these two questions, and if you do not answer them "truly the policy shall be void." But then when the trial "comes on as to whether the Plaintiff has made out his "right under the policy, the question is whether the direction "to the jury ought to have been: "You are to ascertain "whether what was then stated was untrue, was false. If it "was false there is no question as to whether it was material "or not, the parties having stipulated that if it be false the "policy shall be void. Therefore the question for the jury to "decide was simply whether it was false or not. In that nar-"row compass the whole case lies." Id. 9. In which view Lords Brougham and St. Leonard concurred. Shaw and Ellis, 231; materiality of no consequence. *Statements as to age:* A declaration of the age and state of health made previously to the policy being issued which is always referred to in the policy, is to be taken as a part of it, and where there is no stipulation amounting to a warranty, an untrue allegation of a material fact or a concealment of a material fact will avoid the policy, though such allegation or concealment be the result of accident or negligence and not of design. Angell, § 307. "Les fausses déclarations même sans fraude vicient l'assurance si elles influent sur l'opinion ou du risque; il doit en être de même des omissions ou réticences; ainsi l'erreur sur l'âge est une cause qui annulerait l'assurance soit qu'il y eût fraude ou simplement l'erreur." 2. Alauzet, p. 491. Bunyon, p. 14, remarks on the importance of getting admission as to age from the frequent difficulty of proving it. In the case of a trifling difference in the age of the party insured from that stated in the declaration, although there can be no doubt that an office might successfully resist a claim upon that ground, yet they usually content themselves with deducting such a sum of money from the sum insured for as would compensate the office for additional premiums with interest which ought to have been paid if the age had been accurately stated. *Shaw* and *Ellis*, p. 206, *Vide* also *Reynolds, Insurance*, 93.

As to disclosure by insured of material facts: It is the duty of the insured to disclose all material facts within his knowledge * * * and the concealment of a material fact when a general question is put by the insurers, at the time of effecting the policy, which would elicit the fact, will vitiate the policy. 6 Cushing, 42. *Shaw* and *Ellis*, p. 217. Not only is he required to state all matters within his knowledge which he believes to be material to the question of the insurance, but all which are in fact so. If he conceals anything which he knows to be material, it is a fraud; but, besides that, if he conceals anything which may influence the rate of premium, which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. *Bunyon*, p. 35. *Personal examination by Medical Officer of the Company no removal of obligation to disclose.* The personal appearance and examination of the assured does not remove the obligation resting upon the proposer of communicating all material facts in his knowledge to the insurers. *Bunyon*, p. 37. *As to disclosure of medical attendant*: All insurance offices are desirous to consult with the medical man who has been last in attendance on the assured, and when a reference was made to a person who had been the ordinary adviser, but no mention was made of the person attending at the time of the insurance, the policy was vacated. *Id.* p. 43. It is evident that if a party to be insured should state that he had no medical attendant, whereas he had been attended for a dangerous disorder shortly before the insurance was effected, such a statement falling within the provisions of the policy would avoid it, and this appears to have been held in a case of *Palmer* vs. *Hawes*. Norwich Summer Assizes. ALDERSON, J. *Shaw* and *Ellis*, p. 131. And it would appear from this and other cases that it is important the insurers should be enabled to make enquiries of the medical man who has last had the party under his care, and, therefore, if the medical man who is not the usual medical attendant has been in recent attendance, whether there is or is not a reference to the usual attendant in the declaration, an omission to communicate that fact would be fatal. Angell, § 320; 5 Dowl. and Ryl., 266; 5 Bingh., 503. The insurers always ask, who is the physician of the life insured, that they may make enquiries of him if they see fit, and this question must be answered fully and accurately. It is not enough to give the name of the usual medical attendant, but *every physician really consulted should be named*, and *every one consulted as a physician* although he is an irregular practitioner or quack. Parson's Mercantile Law, p. 558, 9. As to meaning of phrase, Medical Attendant, *vide* Reynolds, 93. As to value

of Private Certificate, 1 Greenleaf, Evidence, p. 611, 12. 2 Taylor, Evidence, § 1584, p. 1420.

KERR and NAGLE, for Plaintiff.

TORRANCE and MORRIS, for Defendants.

INJURES.—RECONCILIATION.

COUR SUPÉRIEURE, Montréal, 2 mars 1864.

Coram LORANGER, J.

PEPIN *vs.* ROCAND, dit BASTIEN.

Jugé: Qu'il n'existe aucune présomption de réconciliation de la part d'un Demandeur, qui lui ait enlevé son droit d'action, par suite d'une entrevue que le Défendeur aurait eue avec lui et durant laquelle les parties auraient bu ensemble, attendu que durant toute cette entrevue le Demandeur aurait protesté qu'il se réservait son droit de poursuivre la réparation du délit commis envers lui.

Le Demandeur ayant poursuivi pour la somme de £125, montant de certains dommages qu'il alléguait avoir soufferts, par suite des injures verbales proférées contre lui par le Défendeur en octobre 1862, ce dernier plaida qu'en supposant que les allégués du Demandeur fussent vrais, néanmoins, il était sans action, parce qu'avant l'institution de sa demande il y avait eu réconciliation entre eux, les parties ayant bu ensemble.

LORANGER, J.: Il est en preuve que le Demandeur ayant été informé que, s'il faisait entrer le Demandeur dans une auberge et le faisait boire, son procès serait gagné, (ainsi qu'en déposent le témoin Jean-Baptiste Dupré et le Défendeur lui-même), le premier mars, 1863, le Defendeur s'adresse au nommé Hilaire Hotte, le priant de lui procurer une entrevue à cet effet. Les parties se rencontrèrent chez le nommé Jean-Baptiste Chevalier, hôtelier. Le Défendeur prie le Demandeur, ainsi que son fils, de monter dans une chambre où les suivit le nommé Hotte. Là, les parties se parlèrent d'arrangement qui ne put être effectué et se traitèrent sans fiel; amicalement même si l'on en croit les témoins étrangers; les fils du Demandeur disent autre chose. Elles burent même un verre de bière payé par le Défendeur, et le Demandeur offrit un autre verre à la compagnie, ce qui fut refusé, et ils se séparèrent sans rancune apparente. Mais, pendant toute la conversation, pas un mot ne fut dit qui comportait de la part du Demandeur un abandon de son action, ou une remise de l'injure en autant qu'elle lui donnait un droit de poursuivre en justice; au contraire, dans tout le cours de cette entrevue, il a toujours protesté qu'il n'abandonnait pas son procès et ne s'arrangerait pas, et avant même de boire, il fut d'un commun

accord convenu entre le Demandeur et le Défendeur qu'ils plaideraient. Interrogé, le Défendeur dit : J'ai demandé au Demandeur s'il voulait s'arranger ; il m'a dit que oui, qu'il s'arrangerait avec $50 et les frais, je n'ai pas voulu consentir à cet arrangement ; j'en ai ri et j'ai dit au Demandeur, " nous allons plaider, je vais te faire perdre." Le Demandeur a dit : " c'est bon." De ce moment, c'était bien entendu qu'il n'y avait pas d'arrangement. Plus tard, le Défendeur s'est vanté aux témoins Dagenais et Dupré qu'il avait fait perdre le procès du Demandeur en lui faisant prendre un verre de liqueur. Quant à la justification, il est clair que le Défendeur n'en a prouvé aucune. Les injures proférées par le Défendeur étant prouvées, le Demandeur ayant justifié de son action la question qui se présente, est de savoir si le fait que les parties ont bu ensemble et se sont traitées amicalement constitue réconciliation et abandon de l'action du Demandeur ? Or, la Cour, sous les circonstances ci-dessus rapportées, ne voit aucun abandon de l'action.

" La Cour, considérant que le Demandeur a prouvé les allégations essentielles de sa demande, savoir : qu'il a établi en preuve que, le ou vers le commencement du mois d'octobre, 1862, et à plusieurs époques subséquentes, le Défendeur a tenu sur son compte des propos injurieux et diffamatoires, de nature à ternir son caractère, flétrir sa réputation et à lui faire tort dans l'opinion publique ; ce qui, aux termes du droit ; constitue un délit recherchable en dommages et intérêts civils. Considérant que le Défendeur n'a point fait la preuve de la justification qu'il a invoquée, et que, dans le fait que les parties ont bu ensemble, le ou vers le 1er mai dernier, le tribunal ne saurait trouver de présomption de réconciliation de la part du Demandeur qui lui ait enlevé son droit d'action, en autant qu'en l'occasion en question et pendant toute l'entrevue que le Défendeur eut avec lui, il a, à différentes reprises, protesté qu'il se réservait son droit de poursuivre en justice la réparation du délit commis envers lui par le Défendeur, protestation suffisante pour faire disparaître la présomption d'abandon d'action de sa part, et que, conséquemment, le Défendeur n'a point justifié devant la Cour, une défense valable à l'encontre de l'action du Demandeur qui est bien fondée. A rejeté et rejette les défenses du Défendeur, et, faisant droit sur la demande du Demandeur, condamne le Défendeur, à raison du délit ci-haut mentionné par lui commis, à payer au Demandeur la somme de $15.00 de dommages et intérêts civils, avec intérêt de cette date, et les dépens entiers de l'action telle qu'intentée. (8 *J.*, p. 218 et 14 *D. T. B. C.*, p. 364.)

BÉLANGER et DESNOYERS, avocats du Demandeur.

ARCHAMBAULT, avocat du Défendeur.

CONTINUING GUARANTEE.

SUPERIOR COURT, Montreal, 31st May, 1864.

Coram MONK, A. J.

NUNNS *et al.* *vs* BOURNE.

Held: That a letter of guarantee in the following words is not a continuing guarantee,—" At the request of my son in law, Mr. S.T. Pearce, " I write this to inform you, that I will guarantee to you the payment " of any debt which he may contract with you for pianofortes, not exceeding two thousand dollars in amount, whether the same be closed " by his note or otherwise."

" You are at liberty to look upon this as my undertaking to pay you " on his default in the event of your giving him credit to that " extent." (1)

This was an action to recover from Defendant the sum of $2,000, as part of a sum of $10,785.98, alleged to be due for piano-fortes sold and delivered by Plaintiffs to S. T. Pearce, named in the above recited letter, on the faith of that letter, which was written and signed by Defendant. The Defendant pleaded, in effect, that, after the signing of the letter in question, Plaintiff sold and delivered to Pearce piano-fortes to the value of $2,104.50, which were settled for by two notes, which were paid long before the institution of the action. That the debt of $2,104.50 was the first debt contracted by Pearce with Plaintiffs, after the making and signing of the letter of guarantee, and was, in fact, the only debt ever contracted by Pearce on the faith of that letter. The evidence established that the $10,785.98 constituted the balance of a running account for pianos between Plaintiffs and Pearce, and that the $2,104.50 formed the first indebtedness after the giving of the letter of guarantee, and that the amount was settled and paid, as pleaded by Defendant.

ROBERTSON, Q. C., for Plaintiffs, contended that the expression "*any* debt," clearly showed the intention of the writer of the letter to make it a continuing guarantee, and not to confine it to a single operation; and that, if any doubt existed on the point, it ought to be interpreted rather against than in favor of the surety, who was the party stipulating, and, therefore, bound to restrict his liability (if he wished to do so) by clear and positive language.

BETHUNE, Q. C., for Defendant, argued that, if the letter had read, " any debt in which he may, *from time to time*, contract," the guarantee would doubtless have been continuing; but, in the absence of the words " from time to time," the mere expression "any debt," particularly when followed

(1) V. art. 1019 et 1235 C. C.

by the explanation contained in the last paragraph of the letter, could not reasonably be held to cover more than the first transactions after the giving of the letter, to the extent of the limit of $2,000. At all events, it must be admitted that the interpretation claimed by Plaintiffs was at the least doubtful. The rule of law, therefore, under our system, was to give the surety the benefit of the doubt. Voet. Lib., 45, Tit. 1, No. 23, vols. V and VI, p. 117; Pothier, *Obligations*, No. 97; 4 Marcadé, p. 384; *Leblanc* vs. *Rousselle*, 7 *R.J.R.Q.*, p. 455. It could not be denied, that this letter would probably be regarded in England as a continuing guarantee. but there the rule of law was stated to be the very opposite of that recognised under our system. In the language of Abbott, C. J., in *Mason* vs. *Pritchard*, 12 East., p. 27, the words of the contract " were to be taken as strongly against the party giving " the gua-" rantee as the sense of them would admit of." Whereas the rule of interpretation known to our law is, " *dans le doute, la " convention s'interprète contre celui qui a stipulé, et en " faveur de celui qui a contracté l'obligation.*" Even in England the judges were not unanimous on the subject of this rule of interpretation; for, in *Nicholson* vs. *Paget*, 1 Crompton and Meeson, p. 49, BAYLEY, J., said that the court thought it was " the duty of the party who takes such a security to " see that it is couched in such words as that the party so " giving it may distinctly understand to what extent he is " binding himself." And PARK, J., in *Hargrave* vs. *Smee*, p. 244, said that LORD WYNFORD had held the doctrine, " that " a guarantee ought to receive a strict construction."

" The court, considering that Defendant has established, by legal and sufficient evidence, the allegations of the plea by him made and fyled and that the same is well founded in law, doth dismiss Plaintiff's action with costs. (8 *J.*, p. 220.)

A. and W. ROBERTSON, for Plaintiffs.

STRACHAN BETHUNE, Q. C., for Defendant.

FOLLE ENCHERE.

SUPERIOR COURT, Montreal, 31st October, 1863.

Coram BERTHELOT, J.

LANTHIER *vs.* MCCUAIG, *and* divers Opposants.

Held: That it is not competent for a party collocated in a judgment of distribution, by reason of his appearing as a mortgage creditor in the registrar's certificate returned into court with the writ of execution, but who is not otherwise a party to the cause, to move for *folle enchère* against an *adjudicataire.*

This was a motion for *folle enchère* against an *adjudicataire* by a mortgage creditor who was collocated in the judgment of distribution, homologated in the cause, by reason of his appearing as such mortgage creditor in the registrar's certificate returned with the writ of execution, but who was not otherwise a party to the cause.

PER CURIAM : The party moving has no legal *status* in the cause, and cannot be recognized as a party therein entitled to make such a motion as that submitted to the court. The motion must, therefore, be rejected.—Motion rejected. (8 *J.*, p. 221)

B. A. T. DEMONTIGNY, for Plaintiff.

SAISIE A LA DOUANE DE GRAVURES INDECENTES.

COUR SUPÉRIEURE, Montréal, 2 mars 1864.

Présent : LORANGER, Juge.

REGINA, *Sur Information*, *vs.* UNE QUANTITÉ DE JOAILLERIE, *et* SAUNDERS, Réclamant.

Jugé : Que, sur saisie de certains articles contenant des gravures et représentations indécentes, comme importés en cette province en contravention aux lois des douanes, il n'est pas nécessaire que le fait de l'importation soit prouvé ; mais que l'importation est présumée à moins de preuve contraire.

Information contre une quantité de joaillerie contenant 289 épingles de cravate, et 27 *charmes* contenant des peintures et dessins d'un caractère immoral et indécent, dont l'importation est prohibée par les lois de la province, le tout de manufacture étrangère. Les conclusions demandent la confiscation des effets importés. Une réclamation des articles saisis fut produite par Alexander Saunders, qui les réclamait, pour les raisons énumérées dans son plaidoyer. Il allègue que, le 12 janvier, 1862, le réclamant était en possession d'une quantité de joaillerie contenant au-delà de 500 épinglettes de différentes descriptions, et une quantité d'épingles en os, et des *charmes* faits des mêmes matériaux ; que ces articles étaient contenus dans une caisse de sûreté en fer, dans le magasin du réclamant, et n'étaient pas exposés en vente ; que le nommé Thomas Barry se donnant pour un officier de douane, se présenta dans son magasin et le somma d'ouvrir cette caisse de sûreté, sans quoi il requerrait la coopération d'un serrurier pour l'ouvrir ; que le réclamant l'ouvrit, croyant au droit de Barry, et que, là-dessus, Barry emporta 289 épingles de cravate, partie en or et partie en os, et aussi 27 *charmes* en os, que le réclamant croyait être les mêmes que ceux saisis ; qu'à l'époque de la saisie, le réclamant était le propriétaire des articles, et

que cette saisie n'était pas justifiable. Le réclamant niait l'importation des articles saisis et leur caractère immoral et indécent ; et il concluait à ce que la saisie fût déclarée illégale, et que les articles saisis lui fussent rendus. A l'enquête le réclamant admit que 53 des épingles saisies contenaient à leur interieur des gravures et dessins d'un caractère immoral et indécent. L'informant, de son côté, admit que le reste, savoir, les 263 épingles et *charmes* saisis ne contenaient point de peintures ou dessins de ce caractère. De la part de l'information, un témoin, William P. Weir, déposa qu'il avait accompagné Barry, l'officier de douane, au magasin du réclamant ; que, dans une caisse de sûreté, ils avaient trouvé contenue dans des tiroirs une quantité d'épingles et de *charmes ;* que, dans chacun des tiroirs, il se trouvait des épingles contenant des gravures d'un caractère indécent. Ces gravures étaient à l'intérieur des épingles et se voyaient au moyen d'un tube magnificateur. Toutes les épingles furent saisies. Thomas Barry, l'officier de douane qui avait fait la saisie, corrobora ce témoignage. La seule question importante qui était soulevée par le réclamant, était fondée sur la section 84 du chap. 17 des statuts refondus du Canada, et il prétendit que cette clause n'exemptait point l'officier de douane de l'obligation de prouver l'importation. Cette clause était directement contre lui. Elle dit en termes exprès que l'*onus probandi*, en semblable matière, retombera sur le réclamant."

Considering that it is established in evidence that, out of the 289 breast pins and 27 charms seized by Thomas Barry, one of the customs officiers, fifty-three of the pins contained paints or pictures of an indecent and immoral character, as admitted by claimant himself, and that, by the terms of the chapter 17th of the Consolidated Statutes of Canada, the importation in this Province of such articles of an immoral and indecent character is prohibited, whereby and by force of said statute, the said fifty-three pins became liable to be forfeited : Considering, further, that the rest of the breast pins and charms seized, namely, 263 breast pins and 27 charms, did not contain such paints and pictures of an immoral and indecent character, and that such 263 pins and 27 charms were not and are not liable to such seizure and forfeiture : Maintains the information as to the said fifty-three pins containing said paints and pictures of an immoral and indecent character, declares the same to be forfeited, and doth discharge the seizure as to the other 263 pins and 27 charms, orders the same to be restored to the claimant who has proved his right of property thereto, with costs against said claimant. (14 *D. T. B. C.*, p. 367.)

Dorion, Proc.-Gén , pour S. M.

Dunlop et Browne, pour le réclamant.

RESPONSABILITÉ.—OFFICIER DE DOUANE.

COUR SUPÉRIEURE, Montréal, 2 mars 1864.

Présent : LORANGER, Juge.

SAUNDERS, Demandeur, *vs.* BARRY, Défendeur,

Jugé : Qu'un officier de douane qui, en pratiquant la saisie de certains effets prohibés par les lois de douane, a fait enlever d'autres articles dont il ne pouvait déterminer la nature, sans un examen prolongé, ne peut être responsable des dommages résultant de la saisie de ces derniers effets.

LORANGER, Juge : Action de dommages pour avoir pratiqué la saisie dans la cause de *Regina* vs. Une quantité de Joaillerie, et Saunders, réclamant. Les faits qui donnèrent lieu à la poursuite se trouvent détaillés dans la cause de *Regina*, sur information, contre une quantité de joaillerie, et Saunders, intervenant, et nul doute que l'action doit être déboutée. Non seulement l'officier de douane était justifiable en faisant la saisie, mais encore c'était son devoir de le faire. JUGEMENT : " Considering that, by law, no action in the nature of the present action can lie for the recovery of articles seized by a customs officer, acting or pretending to act as such in virtue of the Revenue Laws of this Province, and that it is established in evidence that the articles claimed have been seized by Defendant, as such customs officer acting or pretending to act in virtue of such Revenue Laws, and that an information concerning the said seizure and claiming the forfeiture of the articles seized, has been duly instituted and is now pending before this court : Considering that Defendant, a customs officer, was justifiable in seizing the 289 breast pins and 27 charms mentioned in the declaration, inasmuch as 53 of the said pins being together with the articles claimed inclosed in certain trays in Plaintiff's shop, contained paints and pictures of an indecent and immoral character, the importation of which is prohibited by the Customs Laws of this Province, embodied in the chapter 17th of the Consolidated Statutes of Canada ; that Defendant had just reason to believe that the whole of the articles seized contained prints and pictures of the said immoral and indecent character ; that moreover, he had but difficult means to discriminate the prohibited articles from the others, and that no action can lie against him on account of the seizure, doth dismiss the present action, with costs against Plaintiff. (14 *D. T. B. C.*, p. 370.)

DUNLOP et BROWNE, pour le Demandeur.

ABBOTT et DORMAN, pour le Défendeur.

MARIAGE.—PREUVE.—COMMUNAUTE DE BIENS.

BANC DE LA REINE, EN APPEL, Montréal, 9 mars 1864.

Présents : DUVAL, Juge-en-Chef, MEREDITH, MONDELET et BADGLEY, Juges.

FISHER, Appelante, *et* GAREAU, Intimée.

Jugé, par la Cour Supérieure : Que, dans l'espèce, il y avait preuve d'un premier mariage du nommé Liscom, aux Etats-Unis, et qu'un second mariage par lui contracté en Canada, avant le décès de la première femme, était absolument nul, quoiqu'il n'apparaissait d'aucune mauvaise foi de la part de la seconde femme, laquelle ne pouvait réclamer de droits matrimoniaux par la forme d'action qu'elle avait adoptée

EN APPEL : Que l'action de la Demanderesse, la seconde femme, ne pouvait procéder contre l'Intimée, ès qualité de tutrice, le mineur qu'elle représentait n'étant ni héritier, ni légataire universel du mari défunt, mais seulement légataire particulier.

L'Appelante était veuve de Samuel Liscom, en son vivant demeurant à Argenteuil, dans le Bas-Canada. Le 16 janvier 1804, elle avait épousé Samuel Liscom, et, le consentement des parties avait été reçu à Pointe-Fortune, par le Colonel William Fortune, alors un des juges de paix de Sa Majesté, qui en dressa acte dans les termes suivants : "January 16th, 1804. Samuel Liscom and Hannah Fisher married by Wm. Fortune. Witnesses present : D. Louis Siméon Leroy, Jos. Fortune and Thomas Patrick Fortune." Ce mariage n'ayant été précédé d'aucun contrat, les biens des époux tombèrent sous le régime de la communauté de biens, les deux époux étant, lors de leur mariage, domiciliés à Argenteuil, où ils vécurent continuellement, savoir : Liscom, jusqu'à son décès qui eut lieu en octobre, 1854, et où l'appelante demeurait encore à l'époque de l'institution de l'action. Une fille naquit de ce mariage, le 26 avril, 1807. Pendant le mariage, Liscom acquit des propriétés, entr'autres le No. 16 et partie du No. 17, côté nord de la Rivière Rouge, dans la Seigneurie d'Argenteuil, formant en tout 4 arpents de terre de front sur 30 de profondeur ; le No. 16 fut acquis en 1819, et la partie du No. 17 en 1829. L'appelante, en vertu de la communauté qui existait entre elle et son mari, avait droit, alléguait-elle, à la moitié de cette propriété qui avait été acquise pendant la durée de la communauté. L'intimée était tutrice de Samuel Borner, *alias* Samuel Liscom, en faveur duquel feu Liscom avait légué la propriété entière de ces héritages, en vertu de son testament du 21 décembre, 1850. Ce testament, disait l'appelante, n'avait pu la priver de sa part de communauté dans ces héritages, c'est pourquoi elle poursuivait l'Intimée, qui s'était emparé de la totalité de ces héritages, et qui refusait de livrer la moitié à l'appelante, et cette dernière demandait à être déclarée propriétaire de cette moi-

tié, ainsi que de la moitié des fruits et revenus depuis le décès de son mari, à faire partage de ces biens suivant le cours ordinaire de la loi, et à ce qu'il lui fût rendu compte des fruits et revenus de sa part. L'Intimée, par ses exceptions, admettait être en possession des héritages en question, en sa qualité de tutrice, et en vertu du testament de Liscom, et elle plaida que l'Appelante n'avait jamais été mariée à Liscom, mais que ce dernier, avant son prétendu mariage avec l'appelante avait contracté mariage à Greenwich, dans les Etats-Unis d'Amérique, que sa femme vivait encore à Greenwich; que l'appelante connaissait ce fait, lors de la célébration de son mariage, et que le mariage de l'appelante se trouvait sans effet et nul; que l'appelante, depuis 40 ans, ne vivait plus avec Liscom, qui avait acquis ses biens dans cette période de temps; que l'appelante n'avait en aucune manière contribué à l'achat ou à l'amélioration de ces propriétés; qu'enfin Liscom les avait légués à Samuel Borner, *alias* Samuel Liscom, dont elle était la tutrice. Les questions soulevées étaient les suivantes: 1° Samuel Liscom avait-il été marié à Greenwich, dans les Etats-Unis d'Amérique, avant d'épouser l'appelante? 2° Si Liscom n'avait pas contracté ce mariage à Greenwich, avait-il légalement et valablement épousé l'appelante? avait-elle le droit de demander l'exercice de son droit de communauté sur les héritages en question? et 3° Supposant le mariage de Liscom avec Persis Burr, valable, et conséquemment, celui de l'appelante nul, cette dernière, si elle avait contracté ce mariage de bonne foi, pouvait-elle exercer ses droits sur les biens de la communauté, et quels étaient ses droits? La preuve offerte par l'intimée du mariage de Liscom, à Greenwich, reposait sur la déposition de trois témoins; Polly Liscom qui se disait la fille de Samuel Liscom, Persis Liscom, qui se disait la femme de Samuel Liscom, et, enfin, William Thompson qui avait épousé Polly Liscom. Polly Liscom se disait fille de Samuel Liscom; elle ne produisit pas son extrait de baptême ou de naissance; elle ne se souvenait de Samuel Liscom, qu'à une époque où elle n'avait que trois ans, la seule fois qu'elle l'eût vu. Persis Burr disait qu'elle avait été mariée à Samuel Liscom, en 1792; elle ne savait pas s'il en avait été rédigé acte. Elle avait vécu dix ans avec lui, ne se rappelait pas en quelle année il l'avait laissée, et n'avait depuis reçu qu'une seule lettre de lui, à peu près dans l'année après qu'il l'eût quittée. William Thompson, le mari de Persis Liscom, avait fait des recherches pour trouver un acte de mariage de sa belle-mère, mais inutilement; en 1834, il était allé à St. André, voir Samuel Liscom, qui l'avait appelé son gendre. L'Intimée avait allégué, dans ses défenses, que l'Appelante connaissait le ma-

riage antérieur de Samuel Liscom; elle ne fit aucune preuve de cette allégation.

SMITH, Justice: This is an action to account, brought by the widow of Liscom, as *commune en biens*, against Liscom, legatee. The Defendant pleaded that Plaintiff was not *commune en biens*; for, although she had been married by a magistrate, in due form, in Canada, her husband had previously been married, viz. in the year 1792, in the state of Massachusetts. It appeared that there were no public registries of births in the state of Massachusetts till after the year 1800. But a daughter of the first wife gave some evidence of having seen her father when he left. She was but three years old; but she had a ring on her finger which would not come off, and he said he must cut it. Then her mother, though very old, stated she was married to this man. He thought, therefore, that it was proved that Liscom had a wife living at the time when he married the present Plaintiff. Her action, therefore, must be dismissed. But no doubt a woman who had been imposed upon, and, in *good faith*, had married a man who had another wife, possessed rights which she could maintain in law; but she could not do it by this form of action. Ci-suit le jugement dont est appel, prononcé le 28 juin, 1862: The Court considering that Plaintiff hath failed to establish the material allegations of her action, as set forth in the declaration, and that, at the time of the marriage of Plaintiff with Samuel Liscom, in the year 1804, before William Fortune, Justice of the Peace, he, Liscom, was a married man, having, in the year 1792, intermarried with Persis Burr, at the town of Greenwich, in the state of Massachusetts, one of the United States of America, and that Persis Burr, was, at the time of the celebration of Plaintiff's marriage with Liscom, then living, and that the said marriage is thereby inoperative, null and void, and that, by law, Plaintiff's claims, as the wife of Liscom, are thereby barred from having and maintaining the conclusions of her action: the Court doth, therefore, dismiss said action with costs."

DUVAL, Chief-Justice: The action was instituted against Respondent as if she had been universal legatee of Samuel Liscom, when, in fact, she was *légataire particulière*, and the action is badly brought. The question as to the validity of the marriage, raised by the pleadings, does not therefore come up, and the judgment of the Court below will be confirmed. Ci-suit le jugement de la Cour d'appel: "Considérant que cette action a été intentée contre la Défenderesse, en sa qualité de tutrice dûment nommée en justice à Samuel Borner, *alias* Samuel Liscom, son fils mineur, pour obtenir le partage des biens composant la communauté alléguée avoir ci-devant

existé entre la Demanderesse et Samuel Liscom, avec lequel la Demanderesse allègue avoir été mariée ; considérant que le mineur, Samuel Borner, n'est ni l'héritier, ni le représentant en loi de Samuel Liscom, que la Demanderesse allègue avoir été son époux, et n'a aucune qualité pour consentir ou procéder au partage des biens de la dite communauté, et, qu'en conséquence, dans le jugement prononcé par la Cour Supérieure, à Montréal, le 28e jour de juin, 1862, déboutant la Demanderesse de son action, avec dépens, il n'y a pas erreur, cette Cour confirme le dit jugement. (14 *D. T. B. C.*, p. 372.)

MOREAU, OUIMET et CHAPLEAU, pour l'Appelante.

ROBERTSON, A. pour la Demanderesse.

ABBOTT et DORMAN, pour l'Intimée.

INSTITUTEUR.—DROIT DE CORRECTION.

COUR SUPÉRIEURE, Montréal, 2 mars 1864.

Présent : LORANGER, Juge.

BRISSON, Demandeur, *vs.* LAFONTAINE, dite SURPRENANT, Défenderesse.

Jugé : Que le droit de correction accordé à l'instituteur, ne doit être exercé que dans les cas de nécessité, et seulement au degré proportionné à l'offense et aux circonstances, et que l'instituteur est passible de dommages-intérêts s'il excède ces bornes.

LORANGER, Juge : Action en dommages et intérêts-civils contre une sous-maîtresse d'école. Fait imputé : châtiments corporels excessifs, infligés sur la personne de l'enfant du Demandeur, âgé d'environ six ans. La défense nie le caractère excessif des châtiments, et est fondée sur le droit de correction légitime appartenant à la Défenderesse, sous-maîtresse dans l'école que fréquentait l'enfant du Demandeur. Il résulte de l'enquête que, le 24 décembre, 1862, l'enfant du Demandeur, du nom d'Edmond et âgé de six ans, se trouvant à occuper un rang distingué dans sa classe, fut requis par la Défenderesse de faire son exercice de lecture, ce qu'il ne put faire parce qu'il avait confondu la page du livre indiquée pour cette lecture. Là-dessus, la Défenderesse le fit descendre de son rang qu'elle décerna à l'élève qui occupait le rang suivant. L'enfant se prit alors à pleurer, et la Défenderesse insista de nouveau pour lui faire faire sa lecture. L'enfant ne pouvant se rendre à cette injonction, la Défenderesse le fit supplanter par un troisième élève, et ainsi de suite par tous les autres jusqu'au dernier, lui enjoignant toujours de lire, et l'enfant continuant toujours à pleurer. Alors, elle le frappa pendant dix minutes

ou un quart d'heure sur la main gauche, et peut-être sur les deux, et sur la tête avec un martinet qui avait été donné par les commissaires d'école de la localité à la maîtresse d'école en chef, pour la correction des enfants indociles ou récalcitrants. Ce martinet consistait, suivant la description faite par les témoins et la Demoiselle Boire elle-même, dont le témoignage a été offert par la Défenderesse, en une lanière de cuir longue de quinze pouces, large de trois et épaisse de quelques lignes. Après cette correction faite au milieu des cris de l'enfant qui voulait retourner chez ses parents, elle l'envoya boire, et l'enfant lut ensuite sa leçon, malgré que, sur ce point, le témoignage ne soit pas unanime. Il paraît que l'enfant avait eu sur le dessus de la main gauche un bouton ou clou qui n'était pas encore complètement guéri. Il retourna chez son père, se plaignant de souffrance à la tête ; il avait l'empreinte de deux coups ou barres rouges sur une joue, et des douleurs à la main gauche qu'il avait enflée à l'intérieur, et enflammée à l'extérieur. Le Demandeur conduisit son fils chez un médecin, à la demande même de la Défenderesse, qui le visita aussi ; à l'égard de la lésion faite à la main gauche de l'enfant, ce médecin prescrivit pour lui et lui donna ses soins pendant quelques jours ; l'enfant fut retenu au lit pendant un espace de temps assez considérable ; une ecchymose, suivant le témoignage du médecin consulté, se déclara ; il y eut suppuration, et la main lui aboutit. Depuis ce temps jusqu'au temps de l'enquête, il paraît que l'enfant a refusé de retourner à l'école par crainte des maîtresses d'école. Ces faits, qui sont abondamment prouvés par la demande, n'ont pas été contredits par la défense qui ne pouvant nier le fait de la flagellation infligée à l'enfant, s'est rejetée sur l'impossibilité que des coups de martinet infligés dans la main d'un enfant pussent produire ecchymose et suppuration sur le revers de la main et la faire aboutir. Deux médecins ont été appelés de sa part pour contredire le témoignage du médecin produit par la demande ; mais, n'ayant jamais vu la blessure, ils n'ont pu former leur opinion que sur la description qu'en avait faite leur confrère, et leur témoignage est impuissant à contredire le sien. La défense dit que le châtiment infligé par la Défenderesse dans la main de l'enfant, ne pouvait produire les résultats signalés par la demande ; mais il ne faut pas oublier que la main était déjà malade, qu'il y avait déjà probablement un travail inflammatoire dans le tissu cellulaire, qu'en cet état une ecchymose était bien propre à se manifester, et qu'une suppuration en pouvait être la conséquence naturelle. La défense prétend n'être pas plus responsable des conséquences qui sont résultées du châtiment que si la main eût été saine, et que la Défenderesse ayant eu le droit de corriger l'enfant comme elle

l'a fait à cause de sa désobéissance à exécuter ses ordres, elle ne peut être plus recherchée que si la main de l'enfant n'eût pas déjà éprouvé de lésion. La première question qui se présente est donc celle de la légitimité de la correction. La Défenderesse était-elle justifiable en corrigeant l'enfant comme elle l'a fait ? Sur ce point, le tribunal est décidément défavorable à sa prétention. Sans refuser aux Instituteurs un droit modéré de correction légitime, dans les cas de nécessité absolue, sur les enfants indociles ou récalcitrants, et cela dans l'intérêt de la discipline de l'école et de l'éducation des élèves, l'on ne peut voir dans le fait d'une institutrice qui, sur une faute aussi légère commise par un enfant de six ans, le flagelle aux mains et à la tête pendant dix minutes ou un quart-d'heure, qu'un grave abus d'autorité, un assaut qui constitue un délit punissable au criminel même. Si elle n'avait pas le droit d'infliger ce châtiment comme elle l'a fait, elle doit porter la peine de toutes les conséquences qui en sont résultées. Il doit donc y avoir un jugement prononçant des dommages et intérêts contre elle, et elle doit être condamnée à tous les frais encourus par le Demandeur pour parvenir à cette condamnation. A raison du montant considérable auquel ces frais s'élèvent, la Cour n'accordera point un chiffre de dommages aussi élevé qu'elle l'eût fait sans cela, mais elle doit, néanmoins, jusqu'à un certain point prendre pour les mesurer l'appréciation défavorable qu'elle fait de la conduite de la Défenderesse, et rendre un jugement qui, en consacrant le principe sur lequel il est fondé, servira aussi d'enseignement à ceux à qui la loi confie l'éducation des enfants. £10 de dommages et intérêts civils, est le chiffre que j'établis avec les dépens entiers de l'action.

JUGEMENT : " Considérant que, sans refuser aux Instituteurs un droit de correction modérée contre les élèves indociles ou récalcitrants, droit qui ne peut s'exercer que dans les cas de nécessité, pour le maintien de la discipline des écoles, l'intérêt de l'instruction, et à un degré proportionné aux offenses commises contre la discipline scolaire, il n'en est pas moins vrai que tout châtiment qui excèderait cette limite et qui serait motivé par l'arbitraire, le caprice, la colère ou la mauvaise humeur, constitue un délit punissable, comme les délits ordinaires, et que, dans les cas proposés aux tribunaux, où l'on prétend que la correction présente ce caractère, ils doivent former leurs appréciations sur la nature de l'offense, l'âge de l'élève, sa faute, le plus ou moins de gravité du châtiment et les circonstances dans lesquelles il a été infligé. Considérant que, dans l'espèce actuelle, vu l'âge de l'enfant du Demandeur, et la légèreté de l'infraction de discipline qu'il avait commise, la correction excessive que la Défenderesse lui a fait souffrir,

qui a produit des résultats préjudiciables à la santé de l'enfant et a exposé le Demandeur et sa famille à des inquiétudes et des inconvénients fâcheux, a constitué un abus d'autorité et offert le caractère d'un délit recherchable en dommages et intérêts. Considérant, en conséquence, que le Demandeur était fondé à porter la présente demande en dommages et intérêts civils devant ce tribunal, qu'il l'a prouvée, et que la Défenderesse n'a offert ni prouvé aucune défense légitime à l'encontre de cette demande, déclare frivole et non fondée la dite défense, et, faisant droit sur la demande, condamne la Défenderesse à payer au Demandeur, à raison du délit qu'elle a commis le 24 décembre, 1862, en infligeant à son fils Edmond, âgé de six ans, en la paroisse de St. Constant, sans droit ou justification, un châtiment corporel excessif, la somme de £10, à titre de dommages et intérêts civils, avec intérêt de cette date, et les dépens entiers de l'action. (8 *J.*, p. 173 et 14 *D. T. B. C.*, p. 377.)

LANCTOT, pour le Demandeur.
HUBERT, pour la Défenderesse.

INSCRIPTION DE FAUX.—TESTAMENT.

COUR SUPÉRIEURE, Montréal, 2 mars 1864.

Présent : LORANGER, juge.

BOUSQUET, Demandeur, *vs.* RENOIS, Défendeur, *et* LE DIT RENOIS, Demandeur en faux, *vs.* LE DIT BOUSQUET, Défendeur en faux.

Jugé : Que, dans l'espèce, les moyens invoqués sur inscription en faux contre un testament n'étaient pas suffisamment justifiés pour faire mettre de côté la minute du testament et l'expédition produite.

LORANGER, juge : Une action pétitoire fut intentée par Bousquet contre Renois, son beau-père, réclamant l'hérédité de feue Charlotte Adam, l'épouse en secondes noces de Renois, en vertu de son testament solennel reçu à St Marc, le 14 janvier 1862, devant Pigeon, notaire, instituant le Demandeur son légataire universel ; contre ce testament et l'expédition produite par le Demandeur, Renois, le Défendeur, a pris une inscription de faux, dont les principaux moyens sont : 1° Que la minute compulsée n'est point la vraie minute du testament, qui a été soustraite par le notaire qui l'a remplacée par la minute compulsée et qu'il a fabriquée après coup, et qu'il a fait signer par les témoins. 2° Que si la minute compulsée est bien la minute originale, elle doit être déclarée fausse, parce que le testament n'a pas été l'œuvre de la volonté libre de la

testatrice, qui ne désirait point faire de testament, mais qu'elle a été le fruit des manœuvres du Défendeur en faux, qui, de concert avec le témoin Vary, aurait requis le notaire instrumentaire, qui lui-même aurait requis le témoin Blain, pour l'assister, se seraient rendus chez la testatrice, avec un testament préparé d'avance, et qu'ils auraient reçu au domicile de la testatrice, sans participation légale de sa part, et que le testament n'a pas été fait, nommé et dicté par elle, mais qu'il a été suggéré par le notaire et les témoins ou quelqu'un d'eux. 3° Que la testatrice, à l'époque où elle a fait ce testament, n'avait pas la raison suffisante pour le faire. 4° Que le St-Marc, qui se trouve sur le verso du second feuillet, a été ajouté après coup, et que, s'il a été écrit en même temps que le reste du testament, se trouvant en marge et n'étant pas authentiqué, il doit être supprimé. Avant d'entrer dans l'examen de la preuve, je dois dire qu'il est un point qui m'a frappé par son étrangeté, c'est le défaut d'intér t du Demandeur en faux à poursuivre l'inscription. Il ne prétend pas, par ses moyens que, si elle est maintenue, l'inscription de faux lui profitera. Il dit, au contraire, que si le testament est supprimé, la succession de la testatrice se partagera également entre le Défendeur en faux et Louise Bousquet, ses seuls enfants, en vertu de la loi des successions *ab intestat*. Il s'expose certainement au reproche d'exciper des droits d'autrui ; cependant dépouillons la preuve. Sur le premier point, la fabrication de la minute compulsée et sa substitution à la minute originale, la seule preuve, produite par le Demandeur en faux, consiste dans le témoignage de John Fraser qui prétend avoir vu, le 3 juillet 1863, la première minute entre les mains du notaire instrumentaire qui était venu la communiquer aux avocats du Demandeur en faux, et que, trouvant entre cette minute et celle compulsée des différences résultant de la dissemblance du papier sur lequel elles étaient écrites, du caractère des deux écritures, tant dans le corps de l'acte que dans les renvois, de la manière dont les signatures sont groupées, de la longueur des lignes et d'autres indices calligraphiques, en conclut, sans hésitation, que la première minute a été soustraite, et qu'on y a substitué une minute fabriquée. Mais ce témoignage, outre qu'il est misérablement insuffisant pour faire rejeter un acte semblable, est victorieusement renversé par les clercs du notaire qui déposent de faits matériels, démontrant jusqu'à l'évidence que la minute compulsée est bien réellement celle qui a été rédigée le 14 janvier 1862. Faisons donc immédiatement justice de cette prétention extraordinaire, traitons la minute rapportée comme la vraie minute, et voyons quelle preuve le Demandeur en faux a faite pour l'attaquer et la faire supprimer. Pour premier moyen contre ce testament le

Demandeur en faux dit qu'il n'a pas été l'œuvre de la libre volonté de la testatrice, mais qu'il lui a été arraché et suggéré. Les faits au soutien de ce moyen sont les suivants : Le 11 janvier 1862, Madame Renois avait fait un codicile révoquant un premier testament en date du 8 novembre 1852, ce que son fils, le Défendeur en faux, ayant appris, il lui en fit reproche, sous l'impression qu'il était que, par ce codicile, elle l'avait déshérité au profit du Demandeur en faux, son mari. Il lui rappela qu'elle lui avait souvent promis de faire son testament en sa faveur, et il est naturel de penser qu'il y mit de l'obsession, bien qu'il n'y ait pas de preuve à cet égard. La testatrice étant probablement d'opinion aussi que, par ce codicile, elle avait fait à son fils une injustice qu'elle voulait réparer, lui dit, que, s'il pouvait trouver un moyen de remédier à ce qui avait été fait, elle était prête à lui donner ses biens. Il fut alors convenu que le que le Défendeur en faux irait quérir un notaire devant lequel elle ferait un nouveau testament. Le lendemain, le 12, étant un dimanche, le Demandeur en faux accompagné de Vary, dont il a été parlé ci-haut, se rend de St-Marc, où demeurait la testatrice, à St-Hilaire, et prie le notaire Pigeon de venir chez la testatrice le mardi suivant jour où devait s'absenter le Demandeur en faux auquel on voulait cacher la connaissance de ce nouveau testament, et d'amener des témoins. Le jour fixé, le 14, le notaire, accompagné du nommé Blain qu'il avait requis comme témoin, se rend à St-Marc, passe devant la maison de la testatrice et se rend chez Vary, qui lui avait été en toute probabilité indiqué d'avance, et l'invite à se rendre, avec Blain et lui, chez la testatrice pour recevoir son testament. Vary les prie de le dévancer et les rejoint ensuite chez la testatrice. En arrivant le notaire demande à Madame Renois s'il est vrai qu'elle l'a fait demander ? Elle lui répond que oui, et que c'est pour faire son testament. La testatrice, le notaire et les témoins entrent dans un appartement où ils se renferment, et le notaire se met en frais d'instrumenter. La testatrice lui dit alors : je veux donner tout mon bien à mon garçon, à la charge de payer mille piastres à sa sœur. Le notaire se met à écrire, il avait écrit ainsi pendant environ vingt minutes, quand la femme du Défendeur en faux vint avertir la testatrice que quelques personnes désiraient la voir Elle sort de l'appartement, le notaire écrit deux ou trois lignes pour terminer une phrase, la testatrice revient environ quinze minutes après. Le notaire se remet à l'ouvrage, finit le testament et le lit. Après, ou pendant la première lecture, la testatrice fait remarquer qu'il pourrait arriver que le paiement de mille piastres en un seul paiement, fatiguerait son fils (son garçon comme elle l'appelait,) et voulait que cette somme fût payable en deux ans, la moitié un an après son décès, et l'autre

moitié deux ans après. Le testament qui contenait l'institution du Défendeur en faux, sans ce délai, est modifié en conséquence, et il est signé par les témoins et le notaire ; ces derniers prennent quelques rafraichissements et s'en vont. Le Défendeur en faux était absent, et, pour sauver les apparences, comme il le dit lui-même, il avait emmené avec lui le neveu du Demandeur en faux, afin de lui dérober la connaissance de ce qui devait se passer. Le testament a-t-il été suggéré à la testatrice au moment même de sa confection ? quelqu'un a-t-il usé de captation, à son égard, à cet instant ? Certainement non. La preuve est concluante sur ce point. Jamais testament ne peut être fait plus librement que celui que Madame Renois a fait, le 14 janvier 1862. Mais, lors de l'argumentation, l'on a voulu trouver une preuve matérielle du fait que le testament n'avait pas été écrit en entier sous la dictée de la testatrice et en sa présence, et qu'il avait été préparé d'avance, dans le peu de temps que le notaire et les témoins sont restés dans la maison de la testatrice. Blain, le seul témoin interrogé à cet égard, dit qu'ils sont restés de une heure vingt minutes à une heure et demie, et que, sur ce temps, la testatrice s'est absentée pendant quinze à vingt minutes, durant lesquelles le notaire a suspendu ses écritures. De sorte que, suivant ce témoin, la rédaction du testament et l'accomplissement des formalités d'usage peuvent avoir employé tout au plus une heure. C'est bien peu de temps pour rédiger un testament ; cependant, à la rigueur, il n'est pas impossible à un notaire de rédiger, pendant l'espace d'une heure, un testament de quatre pages et demie écrit sur du papier ordinaire, ayant une marge ordinaire et d'une écriture assez grosse. Puis il ne faut pas perdre de vue le peu de précision avec lequel on apprécie généralement la durée du temps. Ne serait il pas infiniment dangereux d'inférer qu'un testament a été préparé d'avance du court espace de temps employé pour sa rédaction ? Je pourrais passer sous silence un autre indice invoqué par le Demandeur en faux. La sœur du légataire à qui un legs particulier de mille piastres est fait, est désignée comme " Louise une de mes filles " et la testatrice n'en avait pas d'autre. Or, dit-on, cette indication " une de mes filles " fait voir que ce ne peut être la testatrice qui a dicté ce legs ; elle eût dit, Louise ma fille, au lieu de dire, Louise, une de mes filles, n'en ayant qu'une. L'erreur, au contraire, ne peut-elle pas avoir été le plus naturellement du monde commise par le notaire qui ignorait que la testatrice n'avait qu'une fille ? Le testament n'a certainement pas été suggéré lors de sa rédaction ; mais peut-être l'a-t-il été avant ? L'insistance avec laquelle le Défendeur en faux a reproché à sa mère de ne l'avoir pas institué son héritier, peut-elle avoir formé un

moyen de captation capable de faire annuler le testament, comme surpris à la testatrice ? Je crois que non. 1 Furgole, *Testaments*, chap. 5, sect. 3, vol. 1, p. 247 : " Il n'y a guère de matières où l'on trouve plus de variétés et d'embarras dans les écrits des auteurs français, et dans la jurisprudence des arrêts des Cours Supérieures, que dans les questions qui naissent de la captation, et de la suggestion des dispositions testamentaires. Cela vient de ce que les auteurs français, abandonnant les règles du droit romain, se sont fait une idée particulière de la captation et de la suggestion ; idée qu'ils se sont formée sur la disposition de quelques coutumes qui sont en trop petit nombre pour former le droit commun du Royaume, encore moins dans les Pays où l'on suit le Droit Romain." 2 Nouveau Denisart, vbo. *Captation-Suggestion*, sect. 1, paragraph 5, page 187, *in finis* : " Ainsi on peut dire que la captation et la suggestion proprement dites et séparées de toute idée de violence, de dol, de fraude, et d'artifices, n'ont aucun fondement dans les textes du Droit Romain." 3 Furgole, *Loco Citato* : " Les interprètes du Droit écrit ne sont pas tombés dans cet inconvénient, parce qu'ils ont pris pour guide les lois, à l'esprit desquelles ils se sont conformés ; par là ils ont compris la véritable nature de la suggestion et de la captation, et les conditions qui doivent accompagner ces moyens pour rendre inefficaces les dispositions testamentaires. Ils ont donc cru que ces moyens ne pouvaient être bons, qu'en autant qu'ils seraient accompagnés de dol et de fraude." *Idem*, paragraphe 15, p. 250 : " Il est permis de s'attirer des libéralités par des prières, des caresses et des services." *Idem*, paragraphe 45, page 260 : " Dès que l'on s'est formé une juste idée de la suggestion et de la captation, et que l'on est persuadé, comme il nous paraît qu'on doit l'être, que ce ne sont pas des moyens de nullité différents du dol et de la fraude, on s'aperçoit que la première opinion qui déclare suggérée la disposition faite sur l'interrogat d'autrui, et la seconde, qui la fait consister en la simple persuasion, n'ont aucun fondement dans le droit, et que la troisième opinion qui la fait consister au dol, ou en la fraude, est la seule véritable ; après quoi les doutes qui peuvent naître de cette matière ne paraîtront plus si difficiles à résoudre." Ce fut d'après ces principes que l'avocat général de Magalon, plaidant devant le Parlement d'Aix, dans une espèce où arrêt fut rendu en 1779, sur le testament du sieur Fournier, s'exprima en ces termes : " La captation opère la nullité des dispositions testamentaires, lorsqu'elle est accompagnée de dol et de fraude. Tel est l'esprit des lois Romaines. Ces lois autorisent les dispositions qui ont été attirées par des caresses, des prières et des services. Elles présument que ces démarches n'influaient pas d'une manière dangereuse sur la

volonté du testateur ; mais elles prohibent d'une manière expresse, la violence, la ruse, l'artifice ; ces moyens illicites substituant à la volonté du testateur une volonté étrangère ; ils privent le testateur de l'état de liberté que les lois et la raison exigent de lui ; souvent même, ils le forcent à dicter des dispositions que son cœur désavoue." Pour ce qui est du défaut de raison de la testatrice, la manière intelligente dont elle a fait son testament, jointe à la déposition des notaires Fraser et St. Aubin, qui tous deux déposent de sa parfaite sanité d'esprit, et de la possession entière de son intelligence, quand, le onze janvier, deux jours auparavant, ils avaient reçu son codicile, et cela en commun avec plusieurs autres témoins entendus, réfutent victorieusement les avancés craintifs des témoins du Demandeur en faux, dont aucun n'a même dit qu'elle avait perdu l'usage de ses facultés mentales quand elle a fait son testament. Le moyen relatif au mot St. Marc, qui se trouve en marge, mérite à peine une mention ; et les différences entre l'original et la copie, sont si minimes et de si peu d'importance qu'il serait inutile de s'arrêter à ce dernier grief. Sur le tout je suis d'opinion que le testament doit être confirmé.

" La Cour, considérant que, malgré ce qu'en disent au contraire les moyens de faux, la minute produite par Pigeon, notaire, en obéissance à l'interlocutoire rendu dans la cause et compulsée par le greffier du tribunal, est bien la vraie minute du testament de Charlotte Adam, en son vivant veuve du Demandeur en faux, reçu devant Pigeon, notaire, et témoins, à St. Marc, le 14 janvier, 1862 ; considérant que le dit testament a été l'œuvre de la libre volonté de Charlotte Adam ; que le dit testament n'a été ni suggéré ni surpris par le Défendeur en faux ni par d'autres personnes ; qu'à l'époque où elle l'a fait, la testatrice était saine d'esprit, mémoire, jugement et entendement, avait la capacité et était dans les conditions voulues par la loi, pour faire un testament, et qu'elle a bien et vraiment, suivant les exigences de la loi, fait, dicté et nommé aux notaire et témoins le dit testament, qui a été mal à propos argué de faux, et qui est d'ailleurs revêtu de toutes les formes légales pour lui donner validité et authenticité ; considérant, de plus, que l'expédition produite, malgré quelques variantes de phraséologie, impuissantes à en affecter la substance, qui se trouvent entre la dite expédition et la minute, est cependant une copie suffisante de la minute, et que, pour toutes ces raisons, il n'y avait lieu à l'inscription de faux ni contre la minute, ni contre l'expédition, a rejeté et rejette la dite inscription de faux et moyens de faux, avec dépens. Et la Cour ordonne que la minute du dit testament déposée au greffe, et qui fait partie du dossier, soit remise au notaire Pi-

geon, pour reprendre sa place dans son notariat. (14 *D.T.B.C.*, p. 381.)

CARTIER, POMINVILLE et BÉTOURNAY, pour le Demandeur en faux.

DORION et DORION, pour le Défendeur en faux.

PROCEDURE.—DESISTEMENT.—MOTION.

COUR DE CIRCUIT, Québec, 23 février 1864.

Présent : STUART, juge.

LAMBERT *vs.* BERGERON.

Jugé : 1° Qu'une motion pour suspendre la procédure, parce que le Demandeur a fait défaut de payer les frais d'une première action qu'il a retirée, ne sera pas accordée.

2° Qu'une pareille objection, étant par le statut une fin de non recevoir, doit être présentée par un plaidoyer à l'action. (1)

Le Demandeur, *in formâ pauperis*, institua son action contre le Défendeur pour une somme de £34 13 9. Le Défendeur fit alors motion pour suspendre la procédure jusqu'à ce que le Demandeur eût payé au Défendeur la somme de £8 15 6, montant des frais encourus par le Défendeur dans une première poursuite par le Demandeur contre lui, le Défendeur, et pour les mêmes causes que celles de la présente demande, laquelle première poursuite il avait été permis au Demandeur de retirer en payant les frais encourus par le Défendeur.

JOLY, pour le Défendeur : La présente motion est fondée sur la section 25 du ch. 82, des stat. ref. du Bas-Canada, conçue en ces termes : " La partie qui aura ainsi discontinué une " cause, ou une poursuite quelconque, ne pourra pas la recom- " mencer sans avoir payé les frais de la première." La manière toujours adoptée pour se prévaloir de cette disposition de la loi, est par une motion telle que celle maintenant présentée à la cour de la part du Défendeur.

TOUSSIGNANT, pour le Demandeur, répondit que la motion du Défendeur n'était pas la procédure qu'il fallait adopter pour prendre avantage de la clause du statut cité par le Défendeur ; que le Défendeur aurait dû plaider le défaut de paiement allégué dans sa motion par une exception.

STUART, Justice : This case comes before the court on a motion by Defendant to stay proceedings, inasmuch as Plaintiff has not paid to Defendant the costs on a former action brought on the same grounds as the present, and which action Plaintiff was permitted to withdraw on payment of costs to

(1) V. art. 120, 135 et 453 C. P. C.

Defendant. The course now adopted by Defendant has been the course invariably followed before this court for the last five and twenty years, and is much more convenient to the party in default than the proceeding in strict accordance with the law would be; but, upon consulting with Judge TASCHEREAU, he thinks, and we have agreed, that were a party states that he has a question of fact to raise, either that the former action was not withdrawn or disposed of as alleged in the motion, or that the costs which he was bound to pay, have not been paid, then the motion to stay proceedings will not be allowed, and the party will be bound to proceed by regular pleadings, the objection is, by the statute, made a *fin de non recevoir*, and under it, if pleaded, the action must be dismissed.

JUDGMENT: "Take nothing by motion, and Defendant permitted to file a plea to the action, containing the same grounds as those taken in his motion." (14 *D. T. B. C.*, p. 413.)

TALBOT et TOUSSIGNANT, pour le Demandeur.

JOLY, pour le Défendeur.

EXCLUSION DE COMMUNAUTÉ.—DROITS DE LA FEMME.

COUR DE CIRCUIT, Québec, 23 février 1864.

Présent: STUART, Juge.

VÉZINA, Demandeur *vs.* DENIS, Défendeur, *et* DESCARREAU, Opposante.

Jugé: Que la seule clause d'exclusion de communauté, dans un contrat de mariage, ne donne pas à une femme mariée les mêmes droits qu'une séparation de biens contractuelle; et qu'une opposition à fin de distraire, faite par une femme sous de telles circonstances, ne peut avoir l'effet d'empêcher la vente de ses meubles saisis pour une dette contractée par son mari durant le mariage. (1)

Le Demandeur, ayant obtenu jugement contre le Défendeur, fit émaner contre lui une exécution *fieri facias de bonis*, en vertu de laquelle il saisit et arrêta tous les biens meubles qui se trouvaient chez le Défendeur. A cette saisie, Sophie Descareau, l'épouse du Défendeur, prenant la qualité de femme séparée de biens, produisit son opposition à fin de distraire alléguant que, par son contrat de mariage avec le Défendeur, fait et exécuté devant notaires, et dûment enrégistré, il fut, entr'autres clauses, stipulé qu'il n'y aurait aucune communauté de biens entre elle et le Défendeur, nonobstant la coutume de Paris, à quoi ils renoncèrent pour eux et leurs hoirs;

(1) V. art. 1416 à 1419 C. C.

que la vache et les autres effets saisis par le Demandeur, étaient et avaient toujours été la propriété de l'opposante, et n'avaient jamais été la propriété du Défendeur. Le Demandeur contesta cette opposition pour les raisons suivantes: " Parce qu'il n'est pas allégué que l'opposante est marchande " publique, ni qu'elle soit séparée de biens d'avec son mari, " soit contractuellement, soit judiciairement." Puis, outre une dénégation, il plaida fraude et collusion.

GUILBAULT, pour l'Opposante, après avoir identifié les effets saisis et prouvé qu'ils étaient la propriété de l'opposante, tant pour les avoir reçus par donation que pour les avoir acquis de ses propres deniers durant son mariage, maintient que l'opposition, sous de semblables circonstances, devait être maintenue.

TOUSSIGNANT, pour le Demandeur: Par la preuve qui a été faite, il n'y a peut-être qu'un léger doute que les effets saisis soient la propriété de l'opposante; mais, même en admettant son droit de propriété, l'opposante n'est pas recevable à s'opposer à la vente des effets pour le paiement d'une dette contractée depuis son mariage. Nous ne voyons pas, par le contrat de mariage de l'opposante et du Défendeur, qu'il y ait une séparation de biens contractuelle entre eux, mais simplement une exclusion de communauté; or, il y a une grande différence dans l'effet de ces deux conventions. Je ne puis mieux appuyer mon opinion sur ce point qu'en citant " Pothier, *Traité de la Communauté*," Nos. 462 et 464, où les effets différents que produisent les clauses de séparation contractuelle et d'exclusion de communauté sont démontrés. Au No. 462, l'auteur établit d'une manière irréfragable que, quand il s'agit du seul cas d'exclusion de communauté, le mari a droit de percevoir à son profit tous les fruits, tant civils que naturels, qui naissent durant le mariage, pour se récompenser des charges du mariage qu'il supporte; de même que, lorsqu'il y a communauté, ces fruits appartiennent à la communauté, pour la dédommager des charges du mariage qui sont à la charge de la communauté. C'est pourquoi l'opposition doit être renvoyée avec dépens.

STUART, Justice: The contract of marriage upon which the opposition in question is based, and under which it is sought to establish the right of the wife to the property seized in her quality of *séparée de biens* with her husband, is defective in the object for which it appears to have been intended. This marriage contract contains an exclusion of community, but it would have been far more effective had it contained the stipulation mentioned in " Pothier, Traité de la Communauté," No. 464: *Que chacun des conjoints jouira séparément de ses biens. On appelle cette convention séparation contractuelle, elle a cela de plus que la simple exclusion de communauté,*

qu'elle prive le mari de la jouissance des biens de la femme. Jugement: L'opposition est renvoyée avec dépens. (14 *D. T. B. C.*, p. 415.)

TALBOT et TOUSSIGNANT, pour le Demandeur.

PLAMONDON et GUILBAULT, pour l'Opposante.

CURATELLE.—FEMME MARIEE.—AUTORISATION.

SUPERIOR COURT, Quebec, 10 mars 1864.

Before TASCHEREAU, Justice.

LEMESURIER *et al. vs.* LEAHY *et al.*

Jugé: Que la nomination d'une femme, comme curatrice à son mari interdit, contient nécessairement l'autorisation d'administrer les biens de son mari aussi bien que les siens. (1)

The Plaintiffs, merchants, trading at Quebec, brought suit against Defendants, John Leahy, grocer, and Catherine Leahy, wife of Maurice Horan, as well in her own name, as a *marchande publique*, as in her quality of curatrix to Horan, an interdicted lunatic, for $323.43, the amount of a certain promissory note made by John Leahy in favor of Catherine Leahy, and by her endorsed and delivered to Plaintiffs, and for the costs of protesting the same. The declaration of Plaintiffs set forth that Catherine Leahy was and had been, for a long time previous to the interdiction of her husband, and with his consent and authority, carrying on business as a *marchande publique*, and still continued to carry on business as such, and as such had endorsed and delivered the promissory note in question to them, for and in consideration of matters appertaining to her commerce as a *marchande publique*, and in the course of her trade dealings with them as such, and that as such she had bound, both herself and Maurice Horan, her husband; that Defendants had often acknowledged to owe and promised to pay the amount demanded; and concluded that Defendants should be condemned, as well in their own names as in their qualities set forth in the action, *solidairement*, to pay to Plaintiffs the amount of the note, with costs of protest and suit. Catherine Leahy, one of the Defendants, in her quality of curatrix duly appointed to her interdicted husband, pleaded by *défense au fond en droit* and perpetual peremptory exception, that, since the interdiction of Maurice Horan, he could not legally give any consent or authority to her to act as a trader or *marchande publique*, and, conse-

(1) V. art. 177 et 342 C. C.

quently, that she could not bind or oblige Horan, or his estate; that she and Horan were married in Killarney, in the County of Kerry, in Ireland, and had no contract of marriage, and that, by the law of Ireland, no community of property exists between persons so married, and that, in virtue of the premises, she could not exercise the calling of a *marchande publique*, and could, in no way, bind, oblige or render her husband liable; that she had endorsed the promissory note in question, as an accommodation endorser, and without having received, as a *marchande publique*, or otherwise, any value whatever therefor, and that the endorsation did not in any way arise out of her trade or commerce, or the gestion of the estate of Horan, her interdicted husband, but was wholly separate therefrom; of all which Plaintiffs, at the time of receiving the note and endorsation, were well and fully cognizant.

TASCHEREAU, Juge: Le Demandeur demande un jugement contre une femme qu'il allègue être marchande publique, et la question qui se présente est, " si cette femme, *marchande publique*, peut se lier elle-même et si, comme marchande publique, curatrice de son mari, interdit pour cause de démence, elle peut lier son mari." A l'article 136, *Coutume de Paris*, il est dit qu'une femme, marchande publique, ne peut s'obliger sans son mari, touchant le fait et dépendance de la dite marchandise. Mais il est prétendu, par la défense, que, quoique marchande publique, cette femme ne peut seule ester en justice, qu'elle doit être autorisée à cet effet, ou par son mari, ou par le juge. Cette objection de la part de la Défenderesse devra disparaître si l'on consulte les articles 25 et 26, au Traité de la puissance du mari, par Pothier, où il est dit que, lorsqu'un mari est tombé dans un état de démence, cet état, étant une infirmité qui peut lui être survenue sans sa faute, ne doit le priver d'aucun de ses droits, ni par conséquent du droit de puissance qu'il a sur sa femme; la femme demeurant donc toujours sous puissance de mari, à défaut de l'autorisation que ce mari ne peut lui donner, elle doit avoir recours à celle du Juge qui en est représentative. Lorsque, dans ce cas, la femme est créée curatrice par le Juge, à la personne et aux biens de son mari, sa nomination à cette curatelle renferme nécessairement une autorisation pour administrer tant les biens de son mari que les siens; la femme n'a donc besoin d'aucune autre autorisation. Mais elle ne pourrait, sans une autorisation particulière du Juge, aliéner quelqu'un de ses héritages, ni faire aucun autre acte qui excèderait les bornes d'une administration. En conséquence, la femme doit être condamnée, mais pas en sa qualité de curatrice de son mari, qui, tombé en démence, ne pouvait pas autoriser sa femme, ni

consentir que sa femme s'obligeât comme marchande publique. L'action contre la femme, dans sa qualité de curatrice de son mari, doit donc être renvoyée.

JUGEMENT : " La Cour considérant le billet promissoire mentionné en la déclaration des Demandeurs, fait par le Défendeur, John W. Leahy, à Québec, le vingt-six mai, 1862, pour la somme de $320.96, payable à trois mois de date, à l'ordre de Catherine Leahy, et par elle endossé : Considérant que les Demandeurs ont prouvé leur demande contre Leahy, qui, comme faiseur du billet en question, pour bonne et valable considération, est responsable envers les Demandeurs : Considérant que le fait que la Défenderesse Catherine Leahy, non commune en biens avec son mari, Maurice Horan, a été nommée curatrice à son mari tombé en démence, comporte et renferme nécessairement une autorisation pour administrer tant les biens de son mari que les siens, et qu'elle n'a pas besoin d'autre autorisation pour ester en justice et défendre à la présente action : Considérant d'ailleurs qu'elle est prouvée être marchande publique et qu'elle pouvait, comme telle, se lier : Considérant que, lors de la confection du billet, Horan était depuis près de deux ans, en démence et interdit : la Cour condamne John W. Leahy et Catherine Leahy, conjointement et solidairement, à payer aux Demandeurs la somme de $323.46, avec intérêt, et les frais de la présente action ; de plus, maintient la défense en droit et l'exception péremptoire en droit perpétuelle de Catherine Leahy, ès-nom et qualité, avec dépens, et renvoie l'action des Demandeurs, quant à Catherine Leahy, ès-qualité de curatrice au dit Horan, avec dépens. (14 *D. T. B. C.*, p. 417.)

ANDREWS and ANDREWS, for Plaintiffs.

ALLEYN and ALLEYN, for Defendants.

AUTORISATION MARITALE.

COURT OF QUEEN'S BENCH, Montreal, 9th March, 1864.

Coram DUVAL, MEREDITH, MONDELET, BADGLEY, Justices.

HERMAN DANZIGER, Plaintiff in the court below, Appellant, *and* JAMES HENRY RITCHIE *et ux.*, Defendants in the court below, Respondents.

Held: 1st. A married woman is not liable for the price of goods, not being necessaries of life, bought by her without the authorization of her husband.

2nd. Promissory notes signed by a married woman without the authority of her husband are null. (1)

3rd. There is no legal separation as to property between husband and wife, until the judgment pronouncing such separation has been followed by execution. (2)

Cette action avait été instituée devant la Cour Supérieure pour le district de Montréal, pour le recouvrement de la somme de six cent onze dollars et onze cents, que l'Appelant prétendait lui être due par les Intimés en vertu de deux billets promissoires, et d'un compte pour marchandises vendues et livrées. Les billets en question étaient respectivement conçus comme suit : "Montreal, April 12th, 1860. On demand, for value received, I promise to pay to the order of myself, at the Bank of Montreal, the sum of three hundred and thirty six dollars $\frac{65}{100}$, with interest. MARGUERITE LABELLE." "Montreal, April 23rd, 1861. On demand, for value received, I promise to pay to the order of myself, at the Bank of Montreal, in Montreal, the sum of one hundred and fifty dollars ninety six cents, with interest. MARGUERITE LABELLE."

Ces deux billets avaient été endossés par Marguerite Labelle et remis à l'Appelant qui, dans sa déclaration, alléguait : Que Marguerite Labelle était veuve, en premières noces, de Patrick Foley, en son vivant de Montréal, gentilhomme, de qui elle était séparée quant aux biens ; que, le dix-sept août 1862, elle avait convolé en secondes noces avec James Henri Ritchie, l'un des Intimés, dans l'Etat de New-York, l'un des Etats-Unis d'Amérique, mais avec l'intention de revenir à Montréal pour y demeurer avec son époux ; que, de fait, les Intimés étaient revenus à Montréal et y demeuraient ; qu'il n'y avait pas eu de contrat de mariage entre les Intimés, et que, par conséquent, il y avait communauté de biens entre eux ; qu'avant de convoler ainsi en secondes noces, elle était marchande publique et était endettée, en cette qualité, envers l'Appelant en une somme

(1) V. art. 177 C. C.

(2) V. art. 1312 C. C.

de $611 $\frac{11}{100}$, pour le montant des billets ci-dessus mentionnés, y compris l'intérêt accru sur iceux, et pour balance d'un compte de marchandises vendues et livrées, au montant de $45 $\frac{80}{100}$; laquelle somme l'Appelant avait droit d'exiger et recevoir des Intimés comme étant communs en biens. Les intimés plaidèrent, par exception, que Marguerite Labelle n'avait jamais été marchande publique, et ne l'était pas aux dates des billets et du compte en question ; qu'à toutes ces époques, elle était sous puissance de mari, savoir, Patrick Foley, son époux ; que celui-ci ne l'avait jamais autorisée à souscrire les dits billets ou à acheter les dites marchandises ; qu'elle n'avait contracté aucun engagement valable et légal envers l'Appelant, et que, par conséquent, les Défendeurs, intimés, ne devaient rien au Demandeur Appelant. Les intimés opposèrent encore à l'action de l'Appelant une défense au fond en fait. Il fut dit par l'intimé que l'Appelant avait failli de prouver que Marguerite Labelle avait été marchande publique, et qu'elle l'était aux époques indiquées en sa déclaration ; et que l'appelant n'avait pas prouvé non plus qu'elle eût été séparée de biens de Patrick Foley, son premier mari. Le jugement prononçait la séparation, mais l'Appelant n'avait pas prouvé, et rien dans le dossier ne faisait voir que ce jugement eût été suivi d'exécution. Les intimés ne firent point d'enquête et se bornèrent à produire une admission de l'Appelant qu'aux dates des billets et de la fourniture des marchandises, Patrick Foley, premier mari de Marguerite Labelle, était vivant. M. le Juge-Assistant MONK rendit le jugement suivant, le 20 mai 1863 : "The Court, considering that Plaintiff "hath not established in evidence the allegations of his decla-"ration, and, more particularly, that Defendant, Marguerite "Labelle, was legally liable and indebted to Plaintiff, as by "him alleged in his declaration, doth dismiss the action of "Plaintiff, with costs."

CASSIDY, for Appellant : 1° Marguerite Labelle, une des intimés, séparée judiciairement quant aux biens d'avec son premier mari, a consenti valablement les deux billets promissoires dont il est question, aucune autorisation ne lui était nécessaire à cette fin. En agissant de la sorte, elle n'a fait qu'un acte d'administration. Par la loi, elle s'est valablement engagée et obligée jusqu'à concurrence de la valeur de ses biens meubles et du revenu de ses immeubles. La preuve constate que ses biens meubles étaient d'une valeur d'environ mille piastres, lorsqu'elle consentit les deux billets. Et à part cela, il est en preuve qu'elle était en possession de sommes de deniers assez considérables, provenant de la vente de certains biens immeubles. Elle a reçu valeur pour consentir ces billets. 2° En signant ces deux billets à ordre, Marguerite Labelle a

fait, par là même, un acte de commerce par lequel elle est devenue légalement obligée. Aucun autorisation ne lui était nécessaire pour faire cet acte de commerce. Les intimés n'ont n'ont pas répudié cet acte. Ils n'ont point fait voir que la cause, pour laquelle elle avait consenti ces deux billets, n'était pas d'un caractère commercial. Ils n'ont point montré de présomption légale qui faisait présumer commercial l'engagement pris par la personne qui signa ces deux billets, et en laissant subsister cette présomption, ils ne pouvaient en loi se prévaloir du défaut d'autorisation : supposant que la femme séparée doive être autorisée, pour s'engager par rapport à un fait non commercial, il n'est pas nécessaire à tout évènement qu'elle soit autorisée pour fait de commerce. La Cour de première instance aurait dû condamner les Intimés à lui payer $45.30, balance de son compte pour marchandises vendues à la dite Marguerite Labelle. Ces marchandises lui ont été vendues pour son usage personnel, elle en a profité. Rien au contraire n'est prétendu par les Intimés, qui ont reconnu ce compte par une admission qui se trouve au dossier. Prétendre qu'elle aurait dû être autorisée pour acheter ces marchandises dont la valeur totale ne s'est élevée qu'à $212.30, c'est nier à la femme séparée le droit d'administrer ses biens. L'Appelant se croit fondé à demander une condamnation pour le total de sa créance.

Il est évident que l'Appelant fait reposer toutes ses prétentions sur le fait supposé que, lors de la souscription des billets et lors de la fourniture des marchandises, l'Intimée, Marguerite Labelle, était séparée de biens de Patrick Foley, son premier mari, et que, comme femme séparée de biens, elle pouvait s'obliger envers l'Appelant sans qu'il fût besoin d'autorisation. Supposé même qu'il y eût eu séparation de biens réelle et effective, ce qui n'appert pas au dossier, l'Appelant devait encore succomber sur ce point ; car, bien que la femme séparée de biens puisse faire des actes de simple administration et exercer ses actions mobilières, elle ne peut, sans y être autorisée de son mari ou du juge, s'engager dans des transactions du genre de celle dont il s'agit en cette instance, à moins d'être marchande publique, et il est constant que l'intimée ne l'était pas. S'il est vrai que la femme séparée ne peut aliéner ses biens sans autorisation, il l'est également qu'elle ne peut faire aucun de ses actes qui sont de nature à entraîner une aliénation forcée. Or, dans le cas présent, il est incontestable que la souscription de billets et l'achat de marchandises faits par l'intimée produiraient ce résultat, si l'Appelant obtenait gain de cause. La sollicitude dont la loi entoure la femme pour la prémunir contre les conséquences de ses propres actes, dans l'intérêt de la famille et de la société, deviendrait inutile,

et la loi elle-même serait mise au défi. Les intimés se flattent donc que ce tribunal ne sanctionnerait pas une telle doctrine par le jugement qu'il est appelé à prononcer. Mais il est superflu de combattre plus longuement des prétentions qui ne reposent que sur un fait hypothétique. L'Intimée n'était pas séparée de biens de son premier mari ; elle n'était pas marchande publique, et le tribunal de première instance a appliqué avec discernement la loi du pays en déclarant l'Appelant non recevable dans sa demande. Les Intimés n'ont aucun doute que cette cour ne consacre les mêmes principes et ne soit de la même opinion.

DUVAL, Chief-Justice : Stated in effect that the action was on a note, Defendant being the second husband of the woman who made it. The plea was that she was not authorized to make the note. It would appear that the first husband went away to the United States and died there, and that the goods were obtained long after the husband left. By law the authorization of the husband is absolutely necessary. It is incorrect to assimilate the wife not authorized to the minor who contracts. Pothier, in his Treatise of the *puissance maritale*, shews the cases are not similar. If the wife goes to the baker or butcher, the husband is surely as much bound, as if a servant had gone. But the difficulty here, was that the consideration of the note is not proved. We cannot say whether under the circumstances, the articles were or were not necessaries. In addition to this, the judgment of *séparation de biens*, from her first husband, was not executed. The judgment, therefore, must be confirmed.

MONDELET, Juge : Le Jugement dont est appel, est, à mon avis, d'une parfaite exactitude. Il n'y a aucune preuve que cette femme fût marchande publique, séparée *légalement* de biens de son mari, et qu'elle eût la moindre autorité de s'obliger. Indépendamment de ces raisons, il suffit de jeter un coup-d'œil sur le compte dont l'Appelant réclame la balance. Les effets vendus sont évidemment de la sorte qu'une femme vivant de prostitution, comme il paraît qu'elle le faisait, est dans le cas d'acheter. J'approuve le jugement, sous tous les rapports, et je n'hésite aucunement à dire qu'il doit être confirmé.

Jugement confirmé. (14 *D. T. B. C.*, p. 425 et 8 *J.*, p. 103.)

LEBLANC et CASSIDY, pour l'Appelant.

DOUTRE et D'AOUST, pour les Intimés.

ACTION PENALE.

CIRCUIT COURT, Montreal, 30 mars 1864.

Before LORANGER, Justice.

BARRETTE, Plaintiff, *vs.* BERNARD, Defendant.

Jugé : 1° Que l'amende imposée par le stat. ref. du Canada, chap. 6, sec. 60, pour avoir faussement voté au nom d'une personne dont le nom figure sur la liste des électeurs, ne peut être recouvrée dans une cour de juridiction civile.

2° Que l'offense est constituée un délit, et ne peut être poursuivie que devant une cour criminelle, et l'amende imposée, sur conviction par telle cour.

The action was brought against Hercule Bernard, advocate. The declaration set forth that, at an election for the electoral division of Montreal east, held in June, 1863, for the election of a member of the provincial parliament, the Defendant, falsely and knowingly, voted for the Hon. G. E. Cartier, in the St. Louis ward, in the city, in the name of J. Bte-Bernard, whose name was inscribed on the list of voters as "J.-Bte Bernard, Gent. 44, Vitré St," and had thereby become guilty of a misdemeanor punishable by fine, not exceeding $200, payable *sous contrainte par corps.* Conclusions for condemnation for $200, and, in default of payment within a fixed delay, for imprisonment until payment be made. The Defendant pleaded, 1° That he voted as a duly qualified elector, and was a legal voter: 2° *défense au fond en fait.* The clauses of the statute under which the action was bought were the 60th and 87th sec. of consol. stat. of Canada, ch. 6, which are in the following terms: Sec. 60," If, at the election of a member to serve in the legislative council or assembly, any person knowingly personates and falsely assumes to vote in the name of any other person whose name appears on the proper list of voters, whether such person be then living or dead, or if the name of the said other person be the name of a fictitious person, every such person shall be guilty of a misdemeanor, and on being convicted thereof, shall be liable to a fine not exceeding two hundred dollars, or to be imprisoned for a term not exceeding six months, or both, at the discretion of the court." Sec. 87 : " All penalties imposed by this act, shall be recoverable, with full costs of suit, by any person who will sue for the same by action of debt or information, in any of Her Majesty's courts in this province having competent jurisdiction, &c."

LORANGER, Justice : Said that the action could not be maintained in any civil court; that the offence charged was a misdemeanor, and Defendant was liable to trial in a criminal court, and, on conviction, to a fine not exceeding $200. It was

true this had not been pleaded, but the court must notice it, as a matter of jurisdiction.

JUDGMENT: Dismissing action. (14 *D. T. B. C.*, p. 435.)

DOUTRE and D'AOUST, for Plaintiff.

DESROCHERS and OUIMET, for Defendant.

EXPERTISE.—AMELIORATIONS.

COURT OF QUEEN'S BENCH, Montreal, June 9th, 1864.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, A. J., and BADGLEY, A. J.

ASAPH A. KNOWLTON *et al.*, Defendants in Court below, Appellants, *and* MARGARET CLARKE *et vir*, Plaintiff in Court below, Respondents.

Held: 1. That a sworn land surveyor, appointed an *expert* by rule of Court, in a petitory action, to establish certain land boundaries, must be sworn before acting as such, and in default of his so being sworn, his report will be set aside even without any special motion on that ground. (1) 2. A possessor in good faith is entitled to his ameliorations, and is not liable for the rents, issues and profits accrued previous to service of process. (2)

This was an appeal from a judgment of the Superior Court, at Montreal, in a petitory action, at the suit of Respondents, to recover from Appellants a portion of lot No. 10 in the eighth range of the township of Ely. The Appellants pleaded, that they were the proprietors of the lot of land adjoining said lot No. 10; that no division line existed between their property and that claimed by Respondents; that they had in no way encroached on the lot claimed by Respondents; that, on the property occupied by respondents, they and their *auteurs* had erected mills and other valuable improvements; and that, if such mills and other improvements were really on Respondents lot (which Appellants were not aware was the case, and denied), Appellants were entitled to their ameliorations and improvements and to retain possession of the land till they were paid. On the 27th March, 1862, the Superior Court (presided over by the Hon. Mr. Justice SMITH) ordered an *expertise* by "a sworn surveyor," for the purpose of establishing the true line of division between Appellants' property and that claimed by Respondents, and Henry M. Perrault, a sworn land surveyor, was subsequently appointed by the Court to carry the interlocutary order into effect. The *expert* never

(1) V. art. 330 C. P. C.

(2) V. art. 416, 417, 418 et 419 C. C.

was sworn specially as such, and fyled his report on the 17th of June, 1862, which Respondents moved should be homologated, and which Appellants moved should be rejected, for various reasons set forth in the motion, in none of which, however, was any allusions made to the fact that the *expert* had not been sworn. The final judgment was rendered by Mr. Justice SMITH, on the 31st of October 1862, homologating the report of the *expert*, maintaining Respondents' action and declaring Appellants' claim for improvements compensated by the rents, issues and profits. The Court of Appeal confirmed the judgment of the Court below, so far as it declared Respondents the proprietors of the land in dispute, but set aside the report of the *expert*, on the ground that he had not been sworn, and reversed that portion of the judgment by which the improvements were declared compensated by the rents, issues and profits, on the ground that the Appellants were in good faith and consequently entitled to their improvements, without being liable for any of the rents, issues and profits up to the bringing of the action.

MEREDITH, J.: On the question of improvements and rents, issues and profits, referred to the following authorities: Guyot, Rep., vbo. *Améliorations*, p. 346; Rec., de la Jur. (Lacombe), vbo. *Impenses*, p. 342; 3 Troplong, *priv. and Hyp.*, p. 513, No. 839; Demolombe, *Dist. des Biens*, p. 630, No. 680; 2 Marcadé, p. 411, No. 3. The following are the portions of the judgment of the Court of Appeal, on the points specially reported: "The Court, seeing that H. M. Perreault, the *expert* named in pursuance of the said judgment does not appear to have been sworn, before he acted as such *expert*, the Court doth set aside his report, without however setting aside the plan prepared by him, the correctness of which is established by the evidence of Record. And this Court doth also set aside and reverse the judgment of the Superior Court, rendered on the 31st October 1862, founded on the report of Perrault. And seeing that Appellants and their predecessors, Louis Gravelin and William Gravelin, in good faith, erected the mill and buildings mentioned in the pleadings and made other improvements upon that part of the west half of lot number ten, which adjoins the line A B, it is in consequence ordered, *avant faire droit* thereon, that, by three *experts*, whereof one to be named by Appellants, one by Respondents, and a third by one of the judges of the Superior Court, and, in default of either of the parties naming an *expert* as hereby ordered, within twenty days from the service of the present judgment to be made at the instance of either of said parties, Appellants or Respondents, Defendants and Plaintiffs, then by a judge of the Superior Court, the amount of the improvements, *impenses et*

améliorations, made by Appellants, and their said predecessors, Louis Gravelin and William Gravelin, on the west half of lot number ten,previously to [illegible] institution of the present action, shall be ascertained, and also of the rents, issues and profits of said part of the west half of lot number ten, in the possession of Appellants, from the date of the service of process, to wit, the 20th of August 1856, until the time when the *expertise* shall take place, and the *experts* shall also ascertain whether the mill and buildings, on the west half of lot number ten, or any and which of them, have been built from timber cut off the west half of said lot number ten, and the value of said timber, and it shall be the duty of the *experts* to state, in detail, each item of the improvements estimated by them, and the extent to which each of the improvements, at the time of the *expertise*, increases in value the west half of lot number ten, and also to state in their report the grounds upon which they based their estimate of the rent, issues and profits, and further to state in their report, the several annual values of the mill seat and location upon which the mill and buildings have so been constructed, from the twentieth day of August, 1856, until the time of the *expertise*; and, further, to make a valuation of the part of the west half of lot number ten, of which Defendants are in possession without title, apart from the increased value which the mill and other improvements have given to the property, and that, for the purposes aforesaid, the *experts* shall take into consideration the evidence already adduced, and shall examine such other witnesses as either party may deem in his interest to produce before them, such witnesses having been previously sworn before the *experts*, and the *experts* shall, without delay, make a detailed and particular report in writing to the Superior Court of their operation, accompanied by the evidence in writing given by the witnesses, in order that such proceedings be had in the Superior Court on said report, as to law and justice may appertain." (9 *J*., p. 243.)

A. and W. ROBERTSON, for Appellants.

MACKAY and AUSTIN, for Respondents.

LARCENY.

COURT OF QUEEN'S BENCH, Montreal, December, 9th 1864.

In appeal from the Court of Quarter Sessions, District of Montreal.

Coram DUVAL, C.J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., and MONDELET, J.

REGINA *vs.* LEBŒUF.

A the proprietor of a quantity of broom corn, delivered it to B under the agreement that when B should have manufactured it into brooms, he should not sell them, but that A's clerk should sell them on A's account; that A should deduct his advances from the proceeds of the sale of the brooms, and B should have the balance. B. supplied the smaller material requisite in working up the broomcorn into brooms B did not keep his agreement with A but manufactured the brooms and converted them to his own use.

Held: That A's delivery of the broom corn, to B was a bailment to him, and that B's fraudulently converting it to his own use was larceny in the terms of Cons. Stat. of Canada, Sect. 55, Cap. 92.

This was a case reserved from the Court of Quarter Sessions. The prisoner, Lebœuf, was indicted at the Court of General Sessions of the Peace for the District of Montreal, for the crime of larceny, under the provisions of Sect. 55 of Chap. 92 of the Con. Stat. of Canada, which enacts that "if any person, being a bailee of any property, fraudulently "takes or converts the same to his own use, or the use of any "person other than the owner thereof, although he shall not "break bulk or otherwise determine the bailment, he shall "be guilty of larceny." The indictment was as follows to wit: "The Jurors for our Lady the Queen, upon their oath, "present that Gilbert Lebœuf, late of the city of Montreal, "trader, on the 13th October, 1863, at the city of Montreal, "in the District aforesaid, feloniously, did steal 26,144 pounds "in weight, of broom corn of the value of $1916.26, of the "goods and chattels of Louis Renaud against the form of the "statute, in such case made and provided, and against the "peace of our Lady the Queen, her crown and dignity." It was proved, at the trial, before the Court of Quarter Sessions, on the 3rd September, 1864, that the prisoner had applied to Louis Renaud, the prosecutor, in the early part of October, 1863, to procure for him a large quantity of broom corn, representing himself as a manufacturer of corn brooms. Renaud communicated with his agent at Chicago respecting the price of broom corn, and entered into an agreement with the prisoner that he would import the broom corn, upon the condition that the prisoner would manufacture it into brooms

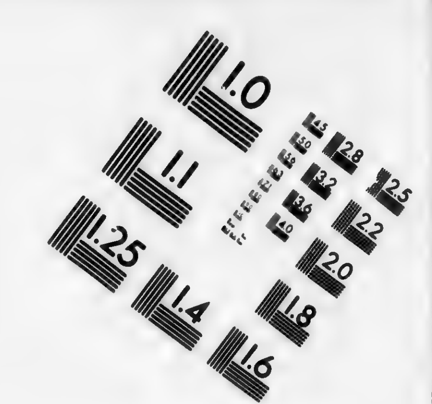
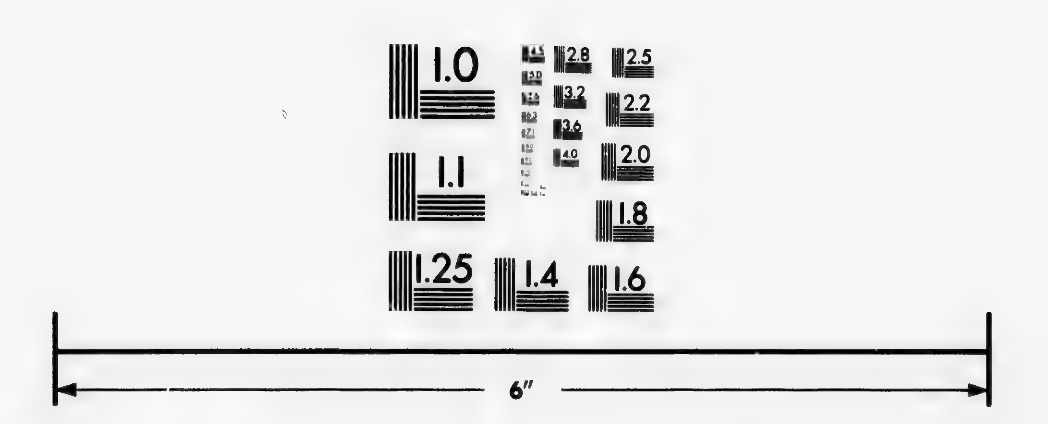
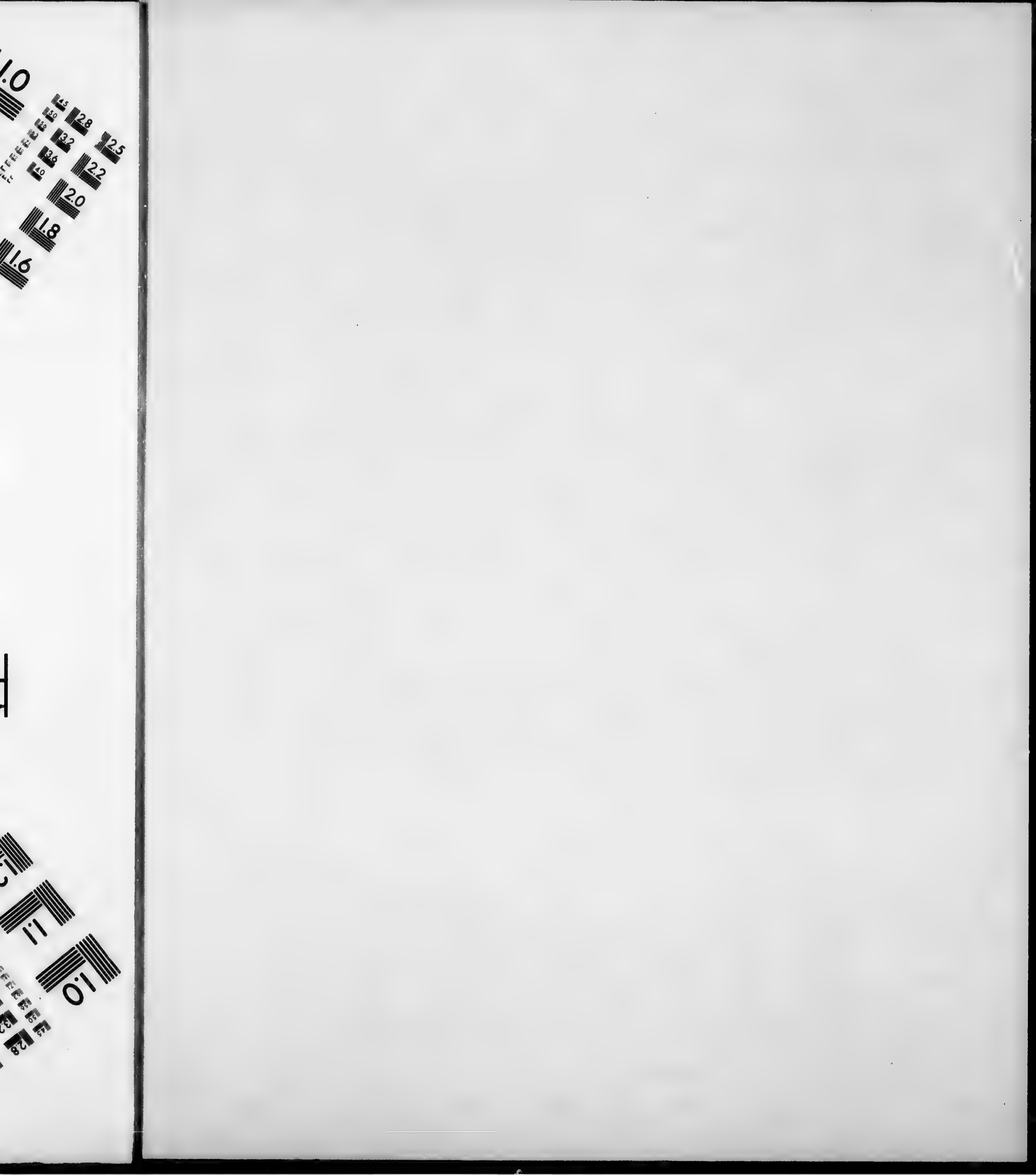


IMAGE EVALUATION
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during the winter, and not sell any of them, and that he, R. should send his clerk the following spring to sell the brooms on Renaud's account, so that he R. might repay himself advances and the balance should be paid over to the prisoner. This the prisoner consented to, stating that he had all the other materials necessary for the manufacture of brooms, and he would supply the same. Renaud accordingly imported from Chicago, in his own name and at his own costs, the quantity of broom corn mentioned in the indictment, and on its arrival here, delivered it to the prisoner, after insuring it as his own property. The prisoner removed the broom corn to premises leased by him. It was established in evidence, according to the reserved case transmitted by Mr. Justice Coursol to the Court of Appeals, that the prisoner, subsequently and during several months, fraudulently converted the whole of the broom corn to his own use, manufacturing the greater part of it into brooms and disposing of them below the wholesale market price; and that the prisoner never returned to Renaud any portion of the broom corn, or the same converted into brooms, in conformity with the aforesaid agreement. At the trial before the Quarter Sessions, the prisoner's counsel, Kerr, urged that there was no proof of a bailment and also the following question of law, (which is the only point reserved), that as the prisoner was not bound to return the broom corn in its original state, but in its altered condition, converted into brooms, the case was not one of bailment within the meaning of the act. Mr. Justice Coursol was of opinion that the prisoner could be found guilty, if the jury were satisfied that the evidence established that there was a bailment of the broom corn made by Renaud to the prisoner, and that there had been also a fraudulent conversion of it by the prisoner. The jury returned a verdict of guilty, the question of law above stated being reserved for the Court of Queen's Bench, and the prisoner being retained meanwhile in custody.

AYLWIN, J., *dissentiens*, said: The case stated was defective. The question of bailment was not the only question, nor the main question. It comprehended further the cardinal point whether there was any larceny at all; the charge was larceny of broom corn; the proof was the sale by the prisoner of corn brooms manufactured by himself. The fact stated in the case reserved, was "that the broom corn was manufactured by the prisoner, upon the condition that he should not sell any of the brooms, and that Renaud should send his clerk to the prisoner the following spring, to take the brooms and sell them on Renaud's account, with the right to pay himself his advances, and pay over what might be left to the prisoner; this

the prisoner agreed to, stating that he had all the other materials necessary for the manufacture of the corn brooms, and would supply the same; this fact was conclusive that there could be neither stealing, taking, nor carrying away of the broom corn, charged in the indictment. The change in the article which occurred by the operation of the manufacturer had altered the article originally bailed. By *specificatio*, under the law of Lower Canada, which was the Civil Law, the prisoner, by the fact of the manufacture, became the owner of the chattel originally bailed. The question of bailment did not arise at all, as in the case reserved. His Honor was therefore clearly of opinion that there was no larceny at all, and that the conviction was wrong. He had therefore to dissent from the judgment of the court.

DRUMMOND, J.: The question reserved was this, whether, as the prisoner was bound to return the broom corn in an altered condition, the transaction could be considered as a bailment within the meaning of the statute. To determine this question it was necessary to ascertain the meaning of the term *bailment*, and it was to the English books, that we must go for this purpose. Bailment had been defined, to be the giving of any property to any person for any purpose whatever. His Honor after referring to the various kinds of bailment, said the present case might come under the class of *locatio operis faciendi*. He thought it was clear the evidence showed that this was a bailment, that the prisoner was a bailee, and that he had converted the property to his own use.

DUVAL, C. J.: The statute under which the prisoner was indicted was one which experience had loudly called for, and the Legislature had been compelled to interfere, to protect persons from the frauds of their clerks and agents. He admitted that, under the old law, the indictment in the present case could not be sustained. But, under the new law, the prisoner was rightly charged as a bailee, who had received a certain quantity of broom corn to manufacture into corn brooms, and had converted the property to his own use.

Judgment to be entered up according to verdict. (9 *J.*, p. 245.)

EDWARD CARTER, Q. C., for Crown.

W. H. Kerr, for Lebœuf.

GREFFIERS DE LA COURONNE REPRESENTANT LA COURONNE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 7 mars 1865.

Before DUVAL, Chief-Justice, AYLWIN, MEREDITH, DRUMMOND and MONDELET, Justices.

REGINA *vs.* LEBŒUF, *and* CARTER, Petitioner.

Jugé: 1° Qu'un greffier de la couronne dans le Bas-Canada, étant conseil de la reine, a droit de comparaître dans une poursuite criminelle pour représenter la couronne.

2° Que les devoirs et privilèges des greffiers de la couronne n'étant pas indiqués dans leurs commissions, ni par statut, la cour référera au droit anglais pour constater les devoirs et privilèges de l'officier analogue en Angleterre, en décidant sur les devoirs et privilèges des greffiers de la couronne dans le Bas-Canada.

In the case of Bennett Young, and others, for extradition, M. Carter, in his capacity of queen's counsel, appeared before the judge of the sessions (MR. COURSOL), on behalf of the crown. The judge held that M. Carter could not legally act as counsel in the matter in question. In the reserved case of *The Queen* vs. *Lebœuf*, M. Carter appeared in the Court of Queen's Bench, on behalf of the crown, and, in order to raise the question, his appearance was objected to by the counsel for Lebœuf, and the point submitted for the decision of the court.

CARTER, Q. C.: The question, as presented to the Court of Queen's Bench, differs, in one particular, from that submitted before Mr. Coursol, in the matter of the St. Albans' prisoners. I appeared in the capacity of Queen's counsel, instructed by the crown, and the only question raised was whether I was precluded, under the 75 sec. of con. stat. for Lower-Canada, chap. 77, from acting in that capacity, being clerk of the crown, M. Coursol's decision was based upon the assumption that I was claiming a personal right and that I was consequently debarred by the clause adverted to. This assumption I respectfully contend was erroneous, as *no personal right* was urged by me, but the rights of the crown conferred upon me to represent its interests, which our legislature, in enacting the clause referred to, could never be supposed to have interfered with, more particularly as the clause cited from the interpretation act, clearly exempts the crown from the operation of any prohibitory clause, unless specially mentioned. In the present case, I urge my right to appear upon the following grounds: 1st. That being clerk of the crown, I possess the power of representing the crown in all criminal matters, as incident to the office of clerk of the crown, as it existed in England, when the criminal law of that country was introduced into Canada; 2ndly. That no statutory pro-

vision, commission, or patent, defines the duties of that officer, and, necessarily, we must have recourse to the law at the time of its introduction into Canada, to ascertain his powers and duties, and these are clearly shewn by Gude, in his practice of the crown side of the Court of King's Bench; 3dly. that I am one of the officers of the Queen's Bench in appeal, being clerk of the crown, having authority by virtue of that office to represent the crown, in any criminal matter within its jurisdiction; 4thly. I urge my right to appear and represent the crown in my capacity of Queen's counsel, and contend that the word "counsel" in the section adverted to, cannot be construed to mean the higher office of Queen's counsel; and, moreover, that the prohibition must be limited so as to deprive me merely of a personal right acquired by me under my commission as an advocate and barrister at law, and not to deprive the crown of its right to avail itself of my services as Queen's counsel; 5thly. That, in a civil case, to which my office of clerk of the crown could have no relation, nevertheless, as queen's counsel, I could represent the interest of the crown, if such were involved in a civil suit, the prohibition to practice, not being intended to deprive the crown of its right to be represented by any of its Queen's counsel; 6thly. that my commission as Queen's counsel is to be regarded as a special commission to represent the interest of the crown when required, and no Cueen's counsel could assume the defence of a case against the crown without a special licence, as shewn by Woolrich, *On criminal law*, p. 169.

MEREDITH, Justice: As our legislature have not defined the duties of the office of clerk of the Crown, and, as the commissions to the clerks of the Crown in this country are framed in general terms, I think that the duties of that office, except when our local laws interfere, must be held to be the same here as in the country from which we have taken our criminal law, of which the office of clerk of the Crown is a usual and, I may say, necessary accompaniment; and indeed it seems to me plain that, if we do not adopt the rule above suggested, we shall be without any rule whatever on the subject. It is true that the commission of a clerk of the Crown is not worded here as it is in England; the difference being that, in England, the offices mentioned in the commission given to the clerck of the Crown, or the master of the Crown office, as he is sometimes called, are the offices of "Coroner "and Attorney of us, and our heirs and successors, in the "Bench of us, our heirs and successors;" (1) the words "clerk of the Crown," or master of the Crown office, not

(1) 1 Gude, p. 21, note *a*.

being mentioned in the english patent; whereas, in the commission under which a clerk of the Crown is appointed in this country, the office is described as the office of "clerk of the Crown, with "all and every the powers, authority, privileges, "emoluments and advantages to the said office of right, and "by law, appertaining." The difference between the two commissions does not however appear to me to be as important as might at first sight be supposed. If, in the english patent, the clerk of the Crown were granted the office of clerk of the Crown, and also the office of Queen's coroner and attorney in the Queen's Bench, then it might fairly be contended that the offices of Queen's coroner and attorney were offices granted *in addition* to the office of clerk of the Crown, and, as the canadian patent contains no such additional grant, that the canadian patentee could not claim any office other than that expressly granted. But the fact is that, in the English patent, the office granted is described in technical language "as the office of coroner and attorney," whereas, in the canadian patent, the office is described by the name under which it is generally known, both in the mother country and in the colony, namely, the office of "clerk of the Crown": and it seems to me that the terms of the canadian patent, although not so technical, are as comprehensive as those of the english patent. Assuming, then, as I think we may do, that, subject to the changes made by our statute law, the duties of a clerk of the Crown are the same here as in England, we have next to see what are the duties of a clerk of the Crown in England. Gude, speaking of the master or clerk of the Crown office, says: "In proceedings in criminal cases, in the Court of King's "Bench, it is the duty of this officer to appear as the King's "attorney:" (1) except in certain cases mentioned, and which have no relation to the matter now under consideration. It has however been objected that, although the clerk of the Crown may be the Queen's attorney, yet that he ought not to be allowed to perform those duties which usually are performed by barristers, namely, to examine the witnesses and argue the case. In order to decide upon this objection, I have thought it right, although perhaps not absolutely necessary, to ascertain what is, in England, the position of the two branches of the legal profession with respect to the privilege of acting as an advocate in Court. So far as I have been able to ascertain, there is no general statute on the subject, and the doctrine appears to be, that, in this, as in other respects, the judges have power to regulate the proceedings in their own Courts. Accordingly, we find that, although attorneys,

(1) 1 Gude, page 23.

according to an ancient usage, are not allowed to practice as advocates in the Superior Courts, at Westminster Hall, yet, that, in the county and other local Courts, and in the quarter sessions, in remote places, where members of the bar do not attend, "members of the other branch of the profession, " namely, attornies, are permitted to act as advocates. Even " as to the Superior Courts." (1) Judge Littledale, in the case of *Collier* vs. *Hicks*, in which the right of the attorney to act as an advocate on the trial of an information before Justices of the Peace was fully discussed, observed: " Every Court of " justice has the power of regulating its own proceedings. In " the Superior Court, in Westminster Hall, when barristers " attend, they only are permitted to act as advocates, *perhaps*, " *if they did not attend, attorneys might be heard as advo-* " *cates*;" (2) and Chief-Justice Wilmot, delivering the unanimous opinion of the Judges, in answer to the questions submitted to them by the House of Lords in the well known case of John Wilkes, speaking of the office of attorney general, said: " The great abilities of the persons appointed to " this office have made it figure high in the imagination, and " annexed ideas which do not belong to it. He, the attorney " general, is but an attorney, although to the king, and in no " different relation to him than every other attorney is to his " employer." (3) The result of my examination of the authorities, on this subject, is to lead me to believe that, in England, there is no positive rule of law to prevent any Court of justice from allowing the attorney, even of a private individual, from acting as an advocate in any case where it might be thought necessary to do so. And I have not found any decision or authority of any kind, even tending to establish that the usage which excludes the attorneys of private individuals from practising as advocates in the Superior Courts, could be extended by the Court of Queen's Bench in England so as to prevent the clerk of the Crown, as the attorney of the Queen, from conducting criminal prosecutions before that Court, if ordered to do so by the government. It appears that the Superior Courts at Westminster have always been anxious to prevent any connexion between the two branches of the legal profession, which could afford opportunities for malversation; (4) but it is plain, that no reason of this kind could be urged as an objection to the master of the Crown office con-

(1) Pulling's Law of Attorneys, pp. 8, 139.

(2) 2 Barn. and Ad., *Collier* vs. *Hicks*.

(3) 19 State Trials, p. 1129.

(4) Lord Denman, in Exp. Bateman, 6 Ad. and Ellis, page 858.

ducting criminal prosecutions in the Court of which he is an officer. As to the practice in England, I have not been able to find any case in which the clerk of the Crown conducted the prosecution; but this may perhaps be accounted for by the great amount of other business which, it may well be supposed, that officer has to attend to. Besides, we know that, for sometime past, but few criminal cases have been tried before the english Court of Queen's Bench, and that those cases are generally of such importance as to secure the attendance of counsel. But, judging from the observations made in the case of *The Queen* vs. *Farrell*, (1) tried at Dublin in 1848, before Chief Baron Pigot and Baron Pennefather, there cannot I think be any reasonable doubt that, in Ireland, the clerk of the Crown is not only permitted, but required, to conduct prosecutions, when counsel are not employed to prosecute. In that case, the clerk of the Crown, *who had conducted the prosecution* had omitted to examine a witness, whose name appeared on the back of the indictment. The attention of the Court having been called to the fact, Baron Pennefather, a very eminent and also a very experienced judge observed: " That it was very wrong not to have called the witness and " examined him at the trial," adding: " It is the duty of the " clerk of the Crown, where counsel are not employed, to con- " duct the prosecution generally, and examine the witnesses." and M. Curran, who had defended the prisoners, then observed: "It would be very desirable, if your lordships would " make a rule that has been made in England, that where " there is no counsel employed by the prosecution, the prose- " cution should be given to one of the junior counsel present, " for the assistance of the clerk of the Crown who has a great " deal of other business to attend to." But Baron Pennefather " said, " I disapprove of employing counsel on the moment, as " I do not think a prosecution can be properly carried on in " that way:" adding further: " I will say that, in many instan- " ces, cases are very improperly prosecuted by the clerk of the " Crown." (2) This case is not reported as showing, according to the words of the learned Baron, " that where counsel are " not employed to prosecute, it is the duty of the clerk of the " Crown to conduct the prosecution, generally, and examine " the witnesses." Indeed, that point is not even noticed in the marginal abstract of the case nor in the index to the volume. But, it is not the less true, that the fact of the clerk of the Crown having actually conducted the prosecution, the observation of Baron Pennefather, in the presence of the Chief

(1) 3 Cox, C. C., p. 139.

2) The *Queen* vs. *Farrell*, 3 Cox, C. C., p. 139.

Baron, and the suggestion of M. Curran, as to adopting the english practice of employing one of the junior counsel "for the assistance of the clerk of the Crown," are conclusive evidence of the practice in Ireland as to the point under consideration. The fact that the practice is incidentally established without any direct reference to it by the reporter, makes the report, in some respects, more valuable; because, it shews that the practice was so generally known and acquiesced in, that it was deemed unnecessary to call attention to it. We have also the satisfaction of knowing that the opinion of some of the most distinguished judges of our own country, have been perfectly in accordance with the practice of the Queen's Bench in Ireland to which I have alluded. At the argument in this cause, my brother Drummond mentioned that, upon the occasion of a difference of opinion at Sherbrooke, between the then Chief-Justice, Sir James Stuart, and the solicitor general, as to the immediate prosecution of a case, Sir James Stuart said, "that if the Queen's counsel would not proceed with the "prosecution, he would direct the clerk of the Crown to do so." Thus assuming that it was competent for the clerk of the crown to act as Crown prosecutor. I also understood Judge AYLWIN to say that, at Sorel, in 1862, he had ordered or allowed the clerk of the Crown to act as Crown prosecutor; and I am quite within bounds when I say that, Sir James Stuart and my brother Aylwin were as little likely to be mistaken, on a point of this kind, as any judges in this part of Her Majesty's dominions. (1) It was however contended that although a clerk of the Crown could have acted as Crown prosecutor before the passing of the statute, 12 Vic., cap. 37, sec. 30, that he cannot do so since that statute became law. But this pretension is, I think, plainly wrong. It has been said that, although the Court may order the clerk of the Crown to conduct a criminal prosecution, it does not follow that officer could perform the same duty, without an order from the Court. But the Court could not legally order a public officer to do an act, not being a part of his duty. Moreover, it is for the Crown, and not for the Court, to determine by whom, on behalf of the public, prosecutions are to be conducted; and when the clerk of the Crown is authorized by the executive to represent the Crown, I think this Court has no power to interfere; but when no other person is empowered to act for the Crown, then the Court may order the clerk of the Crown to conduct the prosecution, inasmuch as it is a part of his duty to do so, and as the Crown, in that case, would not have exercised the power of causing the same duty to be performed by another person.

(1) 12 Vict., cap. 37, sec. 30.

Neither in England, nor in this country, it is absolutely necessary that the clerk of the Crown should be a barrister. (1) And according to the views which I have already explained, when a clerk of the Crown, being a barrister, conducts a criminal prosecution for the Crown, he does so under his commission as clerk of the Crown, and not under his commission as a barrister; and therefore the statute prohibiting him from practising as a barrister can have no bearing upon the case. The question really is this, is it the duty of the clerk of the Crown, as such, to conduct a criminal prosecution when required to do so by the Crown? If it is, then he cannot be prevented from performing that duty by a statute the object of which was to secure the efficient performance of all the duties of his office, and the prohibitions of which are exclusively directed against the performance of duties distinct from those of his office, as clerk of the Crown. There may be objections, in theory, to the clerk of the Crown acting as Crown prosecutor. But, in England and Ireland, those objections have not been considered of sufficient weight to cause any change to be made in the duties of that officer; we also know that, in this country, the clerks of the peace for many years discharged the duties of Crown prosecutors in the quarter sessions efficiently and satisfactorily; and that, in principle, there are the same reasons for and against the clerks of the peace acting as Crown prosecutors in the quarter sessions, that there are for and against the clerks of the Crown acting as prosecutors in the Queen's Bench. It is however for the Crown to determine in what cases it may be advisable that the clerk of the Crown should act as Crown prosecutor. The main question that we have to decide is simply, has Her Majesty a right to avail herself of the services of the clerk of the Crown, as Crown prosecutor? And after giving to this subject the best consideration in my power, I must say I know of no law, usage or reason, which would justify us in questioning that right. I shall add, merely, that M. Carter, in the course of his argument before us, claimed the power of acting as Crown prosecutor, not only under his commission as clerk of the Crown, but also under his commission as Queen's counsel; and judging from the only report we yet have of the proceedings before Judge Coursol, it was under his commission as Queen's counsel, that M. Carter, on that occasion, mainly rested his right to take part in the proceedings. I therefore think it proper to observe that,

(1) 1 Gude, p. 22, says "a gentleman at the bar is usually selected to fill "this situation." In this country the office has been held by several gentlemen not members of the legal profession.

in disposing of the case before us, I have found it unnecessary to pronounce any opinion upon the question whether a clerk of the Crown, being a Queen's counsel, can act as such, even on behalf of Her Majesty, since the passing of the provincial statute.

DRUMMOND, Justice: Stated in effect that there were only two questions to be decided: 1st. Whether a clerk of the Crown could conduct criminal prosecutions in Court? This he held to be settled by the authority of the late Sir James STUART, the highest authority that could be referred to in the court, and had been acted upon by M. Justice Aylwin, whose opinion on such a point was not of less weight. It had been concurred in by the executive government, mentioning the attorney general Dorion, in a case at Sorel. Under such circumstances, we were not driven to have recourse to the law of England as explanatory of the duties and powers of clerks of the Crown. The reference to the duties of a coroner *now*, should not mislead us. Bacon, in his Abridgment, vbo. Coroner, told us coroners were so called because they dealt principally with pleas of the Crown, and in former days were the principal conservators of the peace. The second question arose under the provincial statute referred to. What was meant by not practising as a counsel? It meant he should not ressort to clients for a livelihood, should not practice for remuneration or fees. But it did not mean that he should not conduct cases for the Crown, nor that he should not, as Queen's counsel, do all that a Queen's counsel acting for the Crown should do. He might not receive a fee as Queen's Counsel even from the Crown, no more than from a client. He thought the statute went that length, but not so far as to prevent the clerk of the Crown, as Queen's Counsel, to act for the Crown. The Crown could call upon M. Carter to act for the Crown even in a civil case, and the court should be bound to hear him, although the statute would not permit him to receive fees.

MONDELET, Justice, said that the lucid and conclusive observations which the three Honorable Judges who, with himself, composed the majority of the court had made, would dispense with his adding much to them. He would merely remark, that, on this as on all questions, there must be a starting point. The starting point in this case, was the character of the office of clerk of the Crown, the origin and the definition whereof, we had to look for in the criminal law and jurisprudence of the mother country from which we obtained it. Not only the law itself, the very essence of the office, but the machinery to work the office, were also to be known and understood by the same reference to english jurisprudence.

That point had been so clearly elucidated by his Honorable Colleagues, that it would be a mere repetition on his part, if he were to go over the same ground. The pretension that the Cons. Stat. L. C., chap. 77, sec. 73, which enacts that "No clerk of the Crown shall, while he remains such, practice as an advocate, proctor, solicitor, attorney or counsel in Lower Canada," has the effect of preventing the clerk of the Crown from acting for the Crown, he held to be untenable. It would simply amount to this that the clerk of the Crown would not only be restricted in the exercise of duties essentially pertaining to his office, but would, in many cases, be altogether prevented from discharging them. He was an officer of the Crown, and might and should discharge such duties as are appointed to him, by the Crown, provided these were not contrary to law. He was of the same opinion, as to M. Carter's right to act as Queen's counsel. The statute above referred to did not apply, and could not be applied, to a Queen's counsel, and a mere glance at the following definitions would suffice to shew that the prohibition extended no further than to prevent what was well understood by practising in Her Majesty's Courts, for clients and for fees. (1) Whether M. Carter when employed by the crown would, or would not, accept fees from the crown, was a matter which he was sure, would not create much embarassment in his mind, and it was not likely that he would decline accepting them. For the above reasons, and those given by his learned colleagues, he was clearly of opinion that M. Carter had a right to be heard, as clerk of the crown, and as Queen's Counsel.

JUDGMENT: "After having heard counsel, as well on the part of the crown, as M. Kerr for the petitioner, and due deliberation had upon the application of M. Carter, as Queen's counsel, and also as clerk of the Crown for the district of Montreal, doth consider and adjudge that the said Edward Carter, has a right to be heard on the part of the Crown." (15 *D. T. B. C.*, p. 291.)

KERR, for petitioner.

(1) ADVOCATE. The patron of a cause, assisting his client with advice, and who pleads for him: he is the same in the civil and ecclesiastical law, as a counsellor at common law. PROCTOR, *Procurator*. He who undertakes to manage another man's cause, in any Court of civil or ecclesiastical law, for his fee. SOLICITOR, *Solicitator*. A person employed to follow and take care of suits depending in Courts of equity. ATTORNEY, *Attornatus*. Is one that is appointed by another man, to do any thing in his absence. An attorney is either public, in the Courts of record, the King's Bench and Common Pleas etc., and made by warrant from his client; or private, upon occasion for any particular business, who is commonly made by letter of attorney. COUNSEL, COUNSELLOR, *Consiliarius*. A person retained by a client to plead his cause in a Court of judicature.

MUNICIPAL CORPORATIONS.—DAMAGES FROM DRAIN.

COURT OF QUEEN'S BENCH, Montreal, March 9th, 1865.

In appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, A. J., and BADGLEY, A. J.

THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF MONTREAL, *Defendants in Court below*, Appelants, *and* JAMES MITCHELL et al., *Plaintiffs in Court below*, Respondents.

1° The Respondents procured from the Appellants, the Corporation of the City of Montreal, permission to construct a private drain leading from their cellar into the Corporation drain in Common street. An upright shaft extending from the Corporation drain to the surface of the street became choked with mud from the street, and occasioned a reflux of water through the private drain into Respondent's cellar. Held, that the Appellants were liable to indemnify the Respondents for, damages occasioned by the reflux of water, such reflux being clearly attributable to the state of the shaft, and the Appellant's negligence in allowing it to become choked.

2° Owing to the reflux of water the Respondants were obliged to remove a quantity of sugar from their cellar and procure other storage for it. Held, that the expense of additional storage was an item of damage sufficiently proximate to the cause of damage to fall within the liability of the Corporation.

The declaration set forth that Respondents were lessees and occupants of a two story stone store, in Water street, in Montreal, that the street drains, in Common or Water street, and the shaft running into the same, had been made by and were under the jurisdiction of Appellants, who were bound to keep them in order and repair, that Respondents were taxed and paid assessments for that and other purposes, and that Appellants were bound to keep the drains and shaft free from obstructions, and to prevent water and other filth from flowing backward into the premises of Respondents. The storing of the sugar in the cellar was set up, and it was alleged that, owing to the negligence of Appellants, on or about the first or second of October, 1855, water flowed into the cellar from the drain, and damaged the sugar to the extent of £547 7s 8d; that a survey was held upon the sugar, and the same was sold for £258 5s 2d, after deduction of the expenses £5 6s 9d, the previous value of the sugar having been £805 12s 11d. The Respondents also claimed a sum of £100, for expenditure made by them in storing their goods elsewhere, in consequence of having lost the use of the cellar. The Appellants by their plea denied the allegations of Respondents, or that they had caused the

damage, and declared *that, at the time, the drains belonging to the Corporation were in good order*, and that, if Respondents suffered damage, it was not the fault of Appellants, but their own fault, or that of the proprietors of the store, and owing to the bad construction and bad order of the private drains. The Superior Court (Mr. Assistant Justice Monk) rendered the following judgment: "The Court considering that it is established, by the evidence adduced, that the loss and damage sustained by Plaintiffs, and mentioned and complained of in the declaration and demand, resulted from the obstruction in the shafts and drain of Defendants in Common of Water street of the City of Montreal; considering that the loss and damage so complained of was caused by the neglect and default of Defendants, and not by reason of any default, neglect, or omission of Plaintiffs; seeing that Plaintiffs have proved the material allegations of their declaration, doth adjudge and condemn Defendants to pay and satisfy to Plaintiffs, 1st the sum of £547 7s 8d for loss and damage to the sugar of Plaintiffs, and the sum of £68 15s 2d, for storage and rent of other stores which Plaintiffs were obliged to pay, in consequence of the flooding and innundation of their cellars, the said two sums making together £616 2s 10, with interest upon the sum of £616 2s 10d, from this day until actual payment. There was an appeal from this judgment to the Court of Queen's Bench.

STUART, for Appellants, said: It is established that the Corporation have a drain in Commissioners street intended to carry off the water accumulating in the street, after rain, into the drain. The Respondents thought proper for their own use and benefit to introduce a private drain leading from their warehouse, and laid below the level of the floor of their cellar; by doing so, they must be presumed to have known that they were liable to the risks attached to the condition of the drain or from any flooding which might occur in consequence of heavy rains. In the present case it would appear that a very heavy fall of rain had occurred, and that the drain in the street was incapable of discharging the water in sufficient quantity to prevent the reflux and entry into the cellar of Respondents. By an examination of the plan, it will be seen that the private box drain leading into the public drain was laid most improperly, and by its position led to obstructions, and contributed to the accident in question. Drake, one of Respondents' witnesses, when employed to repair and replace the private drain after the accident placed it in a different manner, and asserts that by the skilful mode thus adopted there is no danger of a recurrence of the flooding of the cellar, even though the shaft should hereafter be choked with mud.

It is clear, therefore, that, if Respondent's private drain had been laid in a proper manner, and the connection made in the way subsequently adopted by Drake, the accident could not have occurred, and no attempt would then have been made to render the Corporation responsible for Respondents' negligence and want of care in the construction of their own drain. The Appellants' pretensions are: 1o. That the Corporation are not liable to indemnify parties for any damage caused by the reflux of water in their drains entering into private drains. 2o. That Respondents are guilty of gross negligence and want of care in laying their private drain and connecting it with that of Appellants, and, consequently, under no circumstances could be entitled to damages from them.

TORRANCE, for Respondent, said: At enquête, it was clearly proved that the damage arose from water which flowed into the cellar from the Corporation drains through the private drain, and that such flow took place owing to Appellants' shaft which was erected over the public drain, having become choked with mud, &c. The shaft drains a large surface of ground, including Youville street, "which was very muddy" and the shaft was not properly protected. Duffield says "I have seen the mud from the street descending the upright shaft through the grating which is a large outside grating. There was no grating underneath in that upright shaft to prevent mud and stones from the street from filling it up. To prevent the filling up the shaft in this way, there ought to have been a strainer underneath the grating to intercept the coarser particles." The shaft was very likely to get choked. And in fact the flooding was caused by the choking of the shaft, as has been established by the evidence of the Respondents' witnesses. The amount of the loss, the value of the sugar before and after the flooding, and the amount paid for storage elsewhere in consequence of the loss of the use of cellar, was also clearly established. It was also proved that the cellar in question was a proper place of storing sugar, it being better kept there in certain seasons, and that it as well as adjoining cellars, were so used. The damage in question resulted from a reflux of water arising from the choking and improper construction of a shaft belonging to Appellants. They are liable for their negligence, and ought to reimburse Respondents in the loss they have sustained, and which is directly traceable to the tort and negligence of Appellants. The legal responsibility of the Corporation for the injury sustained, is, Respondents submit, beyond question. In England, an action on the case would lie against a corporation for a neglect of a corporate duty, as for not repairing a creek which they were bound to do. *Angell* and *Ames*, on Corporations, § 382. In

our jurisdiction, in similar circumstances, the Corporation of Montreal has been condemned to pay such damages, and has admitted the liability by submitting to the condemnation : *Vide Kingan* et al. vs. the *Mayor*, &c., and *Walsh* vs. the *Mayor* et al. (1) and *Beliveau* vs. *Corporation*. (2) In Upper Canada, in a somewhat similar action, the Corporation of Toronto was held liable for damages caused by water and filth flowing into a cellar, owing to the improper construction of the drain leading into the main sewer, *Reeves* vs. *Corporation of the City of Toronto*, U. C. Law Journal, vol. 8, p. 35.

BADGLEY, J., said : The Respondents, in 1855, were lessees of a store on Common or Water street of this city, in the cellar of which were stored twenty-eight hds and twenty-eight barrels of sugar. On the 1st or second of October of that year, the water flowing back from the store drain into the cellar greatly damaged the sugar and compelled Respondents to pay for the rent and storage of other premises for their merchandize. The damage suffered by the sugar was £547 7s 8d ; That for extra rent and storage £68 15s 2d ; Amounting together to the full sum of £616 2s 10d, for which Respondents obtained judgment from the Superior Court, and which is now under appeal. The evidence adduced, satisfactorily establishes these amounts, and the fact of the damage and the outlay for extra storage. The declaration charges the occasion of the loss upon the negligence of Appellants, and the defectiveness of their shafts and drains ; these charges are denied by the plea, which asserts the efficiency of shaft and drain, and imputes the loss to the negligence of Respondents, or their lessors of the store, and to the bad construction and bad order of the private drain ; that is, the drain from the store. It is proved that the overflow into the cellar proceeded from the deposit of mud and filth in the shaft which received the street water after a heavy shower of rain, and prevented the regular flow of the water to the river through the Harbour Commissioners' drain, and backed it up until it flowed

(1) Une corporation municipale est responsable des dommages causés par le débordement de ses égouts, si elle a négligé de les entretenir en bon état. (*Kingan et al.* vs. *Le Maire, les échevins et citoyens de la cité de Montréal*, C. S. Montréal, 28 décembre, 1857, MONDELET (C), J., 6 *R. J. R. Q.*, p. 378.) Voir décision semblable dans la cause de *Walsh* vs. *Le Maire, les échevins et les citoyens de la cité de Montréal*, C. S., Montréal, 31 mars 1860, SMITH, J., 9 *R. J. R. Q.*, p. 356.

(2) Dans la cause de *Beliveau* vs. *La Corporation de Montréal*, C. S., Montréal, 28 juin 1856, DAY, J., SMITH, J., et MONDELET, J., 6 *D. T. B. C.*, p. 487, il a été jugé que la municipalité défenderesse était responsable des dommages causés aux marchandises du Demandeur, déposées dans sa cave, par l'eau qui s'y était répandue par une ouverture pratiquée pour introduire un tuyau, pendant que des employés de la municipalité faisaient des réparations à la rue

back into the cellar, through the store drain which had formed a junction with the harbour drain a few feet above the shaft above mentioned. A branch drain in connection with the shaft below the level of the harbour drain casts the drain water into the river. It appears that the store drain was made only after this shaft and branch drain had been made for some time by means of a square wooden box which entered the harbour drain and projected into it about eighteen inches. It is manifest that the shaft being between the store drain and the river outlet of the harbour drain, whenever the shaft should become clogged or choked with mud and rubbish the harbour drain water finding no outlet would flow backwards, and if in a sufficient quantity, would necessarily force itself into the cellar. It was a fault on the part of Appellants whose special duty it necessarily is to have their shafts and drains in good effective order at all times, to have a shaft of the description in question, subject or likely to get choked at overflows of rain, from the water rushing to the shaft charged with quantities of mud and filth from the streets drained by it and choking the outlet of the shaft. The evidence as to the faulty construction of the house drain is by Quinlan, Appellants' witness, who says that the drain *was not made in a proper manner at all,* and by Drake, Respondents' witness, who made a new connection for the wooden drain, by carrying it to a point beyond the shaft, and nearer the river, which he had no doubt would avoid any future flooding of the cellar; but it is clearly proved that when the outlet of the shaft is clear, there could not possibly be any backing of the water into the store. The making of the shaft was to carry off the drainage, and if it was so made as not to answer the purpose, but to cause damage, the corporation must be liable because individuals cannot control their acts. The evidence of the faulty construction of the shaft is in the testimony of Forsyth, a civil engineer of ability who expressed his disapprobation of the mode of its construction, and was of opinion that it was very likely to get choked and to endanger the whole drain for want of a well into which the mud might subside; it is singular if not suspicious also, that neither the city surveyor Quinlan nor the assistant city surveyor Mckenzie have a good word to say in favor of the shaft, and in fact the witnesses generally speak of its defectiveness. The private drain was constructed after the shaft had been made, but the Corporation was paid for the permission of placing it in their brick drain; it was not faulty in itself, because it drained when the shaft was not clogged, and it was this clogging alone which caused damage through it. It has been observed that the evidence has established the injury to have been caused by

the choking of Appellants' shaft; and it only remains to ascertain whether that cause of damage be too remote or whether in fact the damage complained of has not flowed as required by the test of law, *naturally, legally and directly from the fact of the choking of the faulty shaft.* The test for determining whether any particular damage is too remote or not is quite accurate in its application in this case, because the overflowing of the cellar was the natural and distinct consequence of the stoppage of the flowing of the water caused by the choking of the shaft. Yet although the above test for determining whether any particular damage was too remote or not is quite accurate, it must also be applied very cautiously, for an action is maintainable where the damage does not at first sight appear to flow either naturally or directly from the alledged wrongful act; as is given in the case of *Powell* and *Salisbury*, 2 *Young* and *Jarvis*, 391; the action was held good against Defendant for not repairing his fences, *per quoad*, the Plaintiff's horses escaped into Defendant's close, and were there killed by the falling of a haystack. The Court held that the damage in that case was not too remote; surely in this case, with the principle settled by that authority, there can be no doubt of the proximate cause of damage, and the old rule of law becomes strongly applicable, *sic utere tuo ut alienum non lædas.*

MEREDITH, Justice: Said that a citizen had a right to connect his private drain with the corporation drains, at the most convenient point. He could not be compelled to carry the connexion to a distance where it would be beyond all possibility of obstruction. He considered that Respondents' drain was proved not to have joined to the corporation drain in the best manner, it projected too far into the corporation drain. But this could not have caused the damage complained of. It could only have obstructed the water flowing past it, and getting to the shaft, whereas it was evident that the water had passed the point connecting the two drains and had reached the shaft, and finding no passage there, had flowed back into the Respondents' cellar. The Respondents had a right to act on the supposition that the drains of the corporation were good and sufficient drains; the proof established their defects, and the judgment below must be confirmed. Judgment confirmed. (9 *J.*, p. 248 et 14 *D. T. B. C.*, p. 437.)

STUART, H. for Appellants.

TORRANCE and MORRIS, for Respondents.

ASSIGNATION.

CIRCUIT COURT, Québec, 25 février 1865.

Before TASCHEREAU, Justice.

LAIDLAW, Plaintiff, *vs.* JAMIESON *et vir*, Defendants.

Jugé : Qu'un huissier, qui signifie une sommation émanée de la Cour de Circuit, doit informer le Défendeur de la nature et du contenu de l'action. (1)

The question arose upon an exception to the form to the bailiff's return of service to the writ of summons, on the ground that it was insufficient, under the statute, as it ought to contain, among other things, a certificate that the Defendant had been informed by the bailiff, at the time of service, of the contents of the demand. The Defendant referred the court to the Con. Stat. L. C., cap. 83, sec. 173, in which it was clearly laid down that the person serving a writ of summons, issued out of the Circuit Court, should inform the Defendant, or the grown person of his family, on whom the service was effected, of the contents thereof.

ANDREWS, for Plaintiff, answered that the words exhibiting the originals, and the words speaking to the person in the bailiff's return were sufficient.

TASCHEREAU, Justice : Believed the intention of the statute was fully and clearly expressed, in the language of the section referred to, and that a Defendant, at the time of service, should be informed, by the bailiff serving him, of the names of the parties, of the nature and amount of the action, and of the day of the return. JUDGMENT : Parties ouies, la cour maintient l'exception à la forme, et renvoie l'action du Demandeur. (15 *D. T. B. C.*, p. 271.)

ANDREWS and ANDREWS, for Plaintiff.

GIBSONE, for Defendants.

DEPENS.—TAXATION.

COUR DE CIRCUIT, Québec, 2 avril 1864.

Présent : Taschereau, Juge.

AUDET, DIT LAPOINTE, Demandeur, *vs.* ASSELIN, Défendeur, *et* ASSELIN, Opposant.

Jugé : Que l'émanation d'une exécution pour le recouvrement du montant d'un jugement avec dépens, sans taxation, est illégale. (2)

(1) V. art. 57 C. P. C.

(2) V. art. 479 C. P. C.

Le 21 janvier, 1864, le Demandeur obtint jugement contre le Défendeur, pour un montant de £7 10, avec les frais d'une action appelable, se montant à £8 17 6. Le 12 février ensuivant, le Demandeur, sans avoir préalablement fait taxer ses frais, fit émaner, pour le montant de son jugement en capital et frais, un bref d'exécution contre le Défendeur. Le Défendeur, par son opposition à fin d'annuler, représenta : Que les biens meubles saisis exécutés avaient été ainsi saisis en vertu d'un bref de *fieri facias* émané pour une somme de £16 14 10, étant £7 10 pour le principal du jugement rendu contre lui, de plus une autre somme de £9 4 10, pour frais encourus sur la dite action ; que le Demandeur avait ainsi fait émaner le dit bref d'exécution illégalement, et sans avoir fait constater ni taxer contradictoirement, les dits prétendus frais ; que les frais que réclamait le Demandeur n'étaient pas une dette claire et liquide, et que le Défendeur ne pouvait être en aucune manière tenu de les payer avant que le montant d'iceux eût été régulièrement constaté par une taxe régulière faite contradictoirement ; que le Demandeur réclamait, par son writ d'exécution, une somme plus considérable que celle à laquelle il avait droit pour ses frais, et dépassait même le montant qui apparaissait au projet de mémoire de frais dressé par le greffier, même en y ajoutant le coût du writ de *fieri facias*.

TASCHEREAU, juge : La question est de savoir si l'on peut prendre une exécution sans faire taxer le mémoire de frais. Je crois que non ; cela serait donner à une partie le droit de prendre une exécution contre une autre partie sans donner à ce dernier la chance de se défendre, ou plutôt de contester le montant. L'ordonnance de 1667 le dit en tous termes, tit. 33, art. 2 : " Les saisies et exécutions ne se feront que pour chose certaine et liquide ; " on ne peut, et on ne doit saisir les meubles de quelqu'un qu'à défaut de paiement. Or, un débiteur ne peut payer qu'en autant que ce qu'il doit est liquide et certain. Les frais dans une cause ne sont ni liquides ni certains avant d'être taxés par le greffier de cette cour. Mais, dit le Demandeur, l'exécution est toujours bonne, le principal est dû ; ceci est bien vrai, le montant du principal est constaté par le jugement, mais les frais sont aussi dus par ce même jugement (à condition de les faire taxer) et c'est un principe qu'on ne peut pas prendre une exécution pour partie d'un jugement. L'opposition doit dont être maintenue.

JUGEMENT : La cour attendu que les frais adjugés au Demandeur contre le Défendeur par le jugement en cette cause, n'ont pas été taxés contradictoirement avec le Défendeur et que l'exécution contre le Défendeur a été prise, tant pour le capital du jugement que pour les frais, sans taxation légale ; considérant qu'en autant l'exécution a été illégalement émanée

contre le Défendeur, la cour maintient l'opposition à fin d'annuler du Défendeur. (15 *D. T. B. C.*, p. 272.)

CARON, pour le Demandeur.

BOSSÉ et BOSSÉ, pour l'Opposant.

PROCEDURE.—PLAIDOYER.

COUR SUPÉRIEURE, Trois-Rivières, 8 avril 1865.

Présent : POLETTE, juge.

LA BANQUE DU HAUT-CANADA, Demanderesse, *vs.* TURCOTTE *et al.*, Défendeurs.

Jugé : Que, lorsque la déclaration sur un billet promissoire allègue protêt et avis à l'endosseur, et que l'acte notarié produit ne contient aucun certificat qu'avis de protêt a de fait été donné, le Demandeur aura droit d'obtenir jugement sous le §2 de la sec. 86, chap. 83, stat. ref. Bas-Canada, à moins que l'endosseur ne plaide et ne soutienne par son affidavit une dénégation de l'avis de protêt allégué dans la déclaration. (1)

POLETTE, juge : La demande est pour le recouvrement d'une somme de $1,102.45, dont $1, 099.38, montant d'une lettre de change du 18 juillet 1860, tirée par W. A. Starnes et Cie, en faveur de J. B. Boudreau, qui l'a endossée à la Demanderesse, sur l'Hon. J. E. Turcotte, qui l'a acceptée. L'action est dirigée contre les tireurs, l'endosseur et l'accepteur, et la déclaration allègue qu'elle a été présentée à son échéance et protestée à défaut de paiement, et que Boudreau et W. A. Starnes et Cie, en ont eu avis. Tous les Défendeurs ont comparu et ont été forclos du droit de défendre à l'action, après demande régulière à eux faite de plaider. La traite est produite, portant les signatures de tous les Défendeurs, et est accompagnée d'un protêt régulièrement fait à échéance, suivi d'avis réguliers aux tireurs, à l'endosseur et même à l'accepteur. A l'audition Boudreau a prétendu qu'il n'était pas prouvé qu'avis du protêt lui eût été donné, et que ce défaut assurait sa libération. La première question est de savoir si l'on a donné avis du protêt à Boudreau Le protêt est suivi d'avis rédigés régulièrement, mais nous n'avons ni acte, ni certificat pour prouver que cet avis a été transmis à Boudreau, par la poste ou par le notaire parlant à lui-même, ou à son domicile ou lieu d'affaires, et il n'existe aucune preuve *directe* à cet égard. La Demanderesse a eu recours à une preuve de circonstances, et voici ce que le dossier nous offre là-dessus : Boudreau est examiné sur faits et articles, et, après avoir reconnu son endossement, il ajoute qu'il n'a jamais eu avis du protêt de la lettre de change *lors*

(1) V. art. 145 C. P. C.

de son échéance, i. e., le 21 octobre 1860. C'était répondre directement à la question telle qu'elle lui avait été proposée ; mais ce n'est pas dire qu'il n'a jamais eu cet avis dans le délai de la loi, c'est-à-dire, dans les trois jours du protêt. (1) La Demanderesse ne peut se plaindre de cette réponse, car l'interrogatoire n'en demandait pas davantage. Ainsi Boudreau a pu recevoir avis du protêt dans le délai de la loi, car le contraire ne paraît pas. Cette observation est faite pour lier cette circonstance avec ce qui va suivre. A d'autres interrogatoires qui lui sont soumis, il répond qu'il ne peut pas dire que depuis le 21 octobre 1860, il ait retiré du bureau de poste de St. Grégoire (où est son domicile, comme sa procuration à Macaulay le constate) toutes les lettres qui lui avaient été adressées, mais qu'il n'a *pas connaissance* d'avoir retiré de la poste la lettre à laquelle réfère le troisième interrogatoire c'est-à-dire, l'avis du protêt ; qu'il a conservé quelques-unes des lettres qu'il a reçues depuis le 21 octobre 1860, mais qu'il n'en fait pas grand cas, à moins qu'elles ne soient de conséquence ; qu'il ne sait pas lire, mais qu'il a une personne qui les lit et qui fait ses affaires. Pour en finir avec la preuve de circonstances, la cour en viendra de suite à la déposition de Dumoulin qui dit : 1° Qu'il a été l'agent de la Demanderesse depuis 1856, à venir à janvier 1864 ; 2° que la traite a été escomptée à la Banque du Haut-Canada à la demande de Boudreau qui en a eu le produit ; 3° qu'il a toujours cru que le protêt était régulier, qu'il est toujours demeuré en sa possession jusqu'en janvier 1864, et que la traite y était annexée telle qu'elle y est aujourd'hui ; 4° que Boudreau est venu une couple de fois à la banque, et qu'il l'a vu ailleurs deux ou trois fois, qu'il s'inquiétait de savoir si Turcotte était capable de payer la traite, et que, d'après ce qu'il disait, lui témoin a conclu que Boudreau avait peur d'en payer le montant lui-même ; 5° que, depuis un mois, il lui en a parlé ; 6° que, d'après toutes les conversations qu'il a eues avec Boudreau, il a conclu que Boudreau se croyait responsable du paiement de cette traite à la Demanderesse, autrement il n'aurait pas manifesté tant d'inquiétudes ; 7° qu'il paraissait très-inquiet des affaires de Turcotte ; " Boudreau m'en a parlé quelques jours avant ou après la mort de Turcotte," dit-il. En liant toutes ces circonstances les unes avec les autres, l'on en pourra tirer une présomption légale équivalente à une preuve directe du fait qui est le sujet de la difficulté. Le protêt est régulier de même que l'avis à l'endosseur et aux tireurs. Un avis par écrit non signifié, quand le tout doit être fait par un homme de loi, n'aurait pas de sens. Pourquoi un homme de loi qui connaît la nécessité des deux, se contente-

(1) Stat. ref. Bas-Canada, ch. 64, sec. 19.

rait-il d'écrire l'avis sans le signifier ? Une seule réponse est possible : il a pu l'oublier ; et, en ce cas, le défaut d'avis est fatal. Il faudrait bien s'en tenir là, si cette circonstance était prise isolément, mais en la reliant à d'autres, elle a son poids. Boudreau ne sait pas lire, il a une personne qui lit les lettres pour lui et qui fait ses affaires. Il a conservé quelques-unes des lettres qu'il a reçues depuis le 21 octobre 1860, mais il n'en fait pas grand cas, à moins qu'elles ne soient de conséquence. Il ne peut pas dire s'il a retiré du Bureau de Poste toutes les lettres qui lui ont été adressées. *Il n'a pas connaissance d'avoir retiré la lettre à laquelle réfère le troisième interrogatoire, l'avis du protêt.* La loi autorise la transmission de l'avis de protêt par la Poste. (1) Après avoir nié, sur faits et articles, qu'il eût reçu l'avis du protêt, il modifie cette réponse, et, par les explications qu'il donne, il fait voir qu'il n'est guère en état de donner une dénégation directe, et qu'il ne sait pas s'il a reçu cet avis ; car il dit en propres termes qu'il n'a pas connaissance d'avoir retiré la lettre du Bureau de Poste. Le fait que la Demanderesse voulait prouver par lui, lui étant personnel, il devait donner une réponse catégorique, oui ou non ; et, en disant qu'il n'en a pas connaissance, il ne répond pas comme il le doit. S'exprimer ainsi ou dire qu'on ne se rappelle pas, est la même chose. C'est toujours éviter de dire oui ou de dire non ; et comme l'a remarqué un Juge dans la cause de *Beriau* vs. *McCorkill* (2) : " C'est une manière de " répondre que les tribunaux ne peuvent pas approuver." Aussi si la Demanderesse pouvait être présumée connaître ce fait, la cour n'hésiterait pas à le lui demander sur le serment judiciaire. Il y a donc de fortes présomptions que Boudreau a reçu l'avis du protêt. Mais cette présomption se fortifie considérablement du témoignage de Dumoulin. Boudreau va une

(1) Stat. Ref. B. C., ch. 64, sec. 13.

(2) Dans la cause de *Bériau* et *McCorkill*, V avait fait et souscrit, le 14 fevrier 1857, à l'ordre de P, épouse de B, marchande publique et séparée de biens d'avec son mari, un billet au montant de £33 13 4. P, étant devenue propriétaire du billet, l'endossa en faveur de M, cet endossement étant fait par B, pour son épouse. Ce billet, devenu dû et exigible le 15 avril 1857, ne fut point protesté. Le 13 août 1859, M poursuivit V et P pour recouvrer le montant du billet. Après le rapport de cette action, P est décédée, et B, son époux, qu'elle avait institué légataire en usufruit de ses biens et son exécuteur testamentaire, reprit l'instance et prétendit que P avait été libérée de son endossement de ce billet, vu le défaut de protêt et d'avis de protêt, et nia de plus que P eût jamais renoncé à ses droits sous ce rapport. Il a été jugé que, dans l'espèce, le mari était tenu au paiement du montant du billet, nonobstant le défaut de protêt, preuve suffisante étant faite qu'il avait consenti à l'omission du protêt, au nom de sa femme, pour éviter des frais, et que de fait la femme n'était qu'un prête-nom pour couvrir le commerce du mari. (*Bériau* et *McCorkill*, C. B. R., Montréal, le 1er mars 1864, DUVAL, J., MEREDITH, J., MONDELET, J., et BADGLEY, J., confirmant le jugement de C. C., Bedford, 28 janvier, 1863, 14 L. C. R., p. 400.)

couple de fois à la Banque et parle de la traite à Dumoulin ; il lui en parle deux ou trois fois ailleurs, et Dumoulin était l'agent de la Demanderesse. Il s'inquiète de savoir si Turcotte est capable de la payer. Il lui en a encore parlé quelques jours avant ou après la mort de Turcotte, ce qui a dû être vers décembre dernier, car l'acte de sépulture est produit. Enfin, il lui en a parlé depuis un mois, et toujours il a manifesté de l'inquiétude, et d'après les conversations il a paru au témoin que Boudreau se croyait responsable du paiement. Si Boudreau n'avait pas reçu d'avis de protêt, il était libéré de tout engagement et il le savait, car personne n'est censé ignorer les lois de son pays. Pourquoi donc s'inquiétait-il ainsi ? C'est parce que, ayant reçu cet avis, il se sentait obligé de payer. " On the day after a bill became due, the holder's clerk called " upon the drawer, and told him that the bill had been duly " presented, and that the acceptor could not pay it ; to which " the drawer replied that he would see the holder about it. " (Here Boudreau saw Dumoulin, the Plaintiff's agent). Held, " that it was properly left to the jury to infer from this con- " versation that the drawer had due notice of dishonor." (1) L'endosseur peut aussi renoncer à la libération que la négligence ou l'omission du porteur a pu opérer. " Action against " drawer. No evidence of presentment to acceptor, or no- " tice of non payment to drawer. The Bill was due on sa- " turday 7th August, 1819. On the 12th August, witness " called with the bill on Defendant, and informed him, that, " at the request of the Plaintiff, the holder, he called for " payment. The Defendant said he was sorry the acceptor " had not paid the money, that he had promised to advance " the money, but that he had deceived him, and that he " (Defendant) would see the acceptor upon the business and " they would call on the holder. Per Abbot, Chief-Justice. " This is sufficient to waive laches of holder (though Marryat, " considered that there ought to be an express waiver) and " said, that if the drawer deal with the bill after it has been " dishonored, that suffices to charge him." (2) Une autre question a été soulevée. La Demanderesse prétend qu'elle n'était pas obligée de faire preuve de l'avis du protêt, et qu'elle avait droit à un jugement contre Boudreau et contre les autres Défendeurs, parce que ceux-ci n'ont pas produit de défenses ni d'affidavit. " Si dans une action sur lettre de change

(1) *Metcalfe* vs. *Richardson*, 20 English Law and Equity Reports, p. 301 ; (Digest, p. 99, Bills of Exchange) &c., and Harrison's Digest, 1 vol. supp., p. 747, Bills of Exchange.

(2) *Cooper* vs. *Wall*, and *Stivens* vs. *Lynch*, 4 Petersdorf, p. 482 ; *Phipson* vs. *Kneller*, 1 Harrison, p. 1307, Bills of Exchange.

" ou billet négociable, cédule, chèque, écrit ou promesse, ou " autre acte ou marché par écrit sous seing privé, le Défen- " deur fait défaut, *ou si pour toute autre raison le Demandeur " se trouve avoir droit de procéder ex parte,"* (après forclusion " par exemple) " alors telle lettre de change ou billet, chèque, " promesse, acte ou marché, et toute signature et écriture sur " iceux, seront présumés vrais sans en faire la preuve, et juge- " ment pourra être rendu en conséquence." (1) Cette clause est claire, explicite, et comprend absolument tout ce qu'il était nécessaire d'établir pour que la Demanderesse pût obtenir son jugement sans être obligée de faire une preuve. S'il pouvait exister un doute, le deuxième paragraphe de la même section suffirait pour le lever. " Si dans toute telle action un Défen- " deur nie sa signature, ou toute autre signature ou écriture " sur telle lettre de change, billet ou écrit, cédule, chèque, pro- " messe, acte ou marché sous seing privé ou la vérité de tel " document ou de partie d'icelui, ou que le protêt, avis et si- " gnification d'icelui (*si le Demandeur allègue qu'il en a été " fait, ici c'est allégué*) aient été régulièrement faits, que cette " dénégation soit faite en plaidant la dénégation générale ou " dans d'autres plaidoyers, tels documents et signatures seront " néanmoins présumés vrais, et tel protêt, avis et signification " seront considérés comme ayant été régulièrement faits, à " moins qu'avec tel plaidoyer il ne soit produit un affidavit " du dit Défendeur ou de quelque personne agissant comme " son agent ou commis et connaissant les faits en telle qualité, " à l'effet que tel document ou certaine partie importante d'ice- " lui n'est pas vrai, ou que sa signature ou celle de quelqu'au- " tre personne apposée au dit document est contrefaite, ou que " tel protêt, avis et signification n'ont pas été régulièrement " faits et en quoi la prétendue irrégularité consiste." Ainsi l'allégation faite par la Demanderesse que la traite a été pré- sentée à Turcotte qui a refusé de la payer, qu'elle a été pro- testée, et que Boudreau, de même que W. A. Starnes et Cie., ont eu avis du tout, est présumée vraie par la loi, et doit être crue par cette Cour, puisque Boudreau, non plus que les autres Défendeurs ne l'ont pas niée par une défense et un affidavit. Il n'était pas même nécessaire de produire un acte ou certifi- cat de signification d'avis, il lui a suffi de l'alléguer pour en être cru. Le défaut d'un tel acte ou certificat n'est pas diffé- rent, quant à cette présomption, d'un acte qui serait nul à sa face. La loi veut qu'on le présume vrai, et qu'on le prenne comme suffisant; et cette loi est aussi claire que possible, et c'est ainsi que l'a jugé la Cour d'Appel dans deux causes: la

(1) Stat. Ref. B. C., ch. 83, sec. 86.

première est celle de *Chamberlin* vs. *Ball*, (1) et la seconde celle de *Ryan et al.* vs. *Malo*, (2) Cette loi suffirait pour donner jugement en faveur de la Demanderesse. L'on peut dire encore que Boudreau ayant comparu, mais n'ayant pas défendu à l'action, il a par là-même renoncé à l'exception que lui fournissait le défaut de signification de l'avis du protêt, si ce défaut existe ; et qu'il a reconnu cette signification. " Du reste le magistrat possède, à cet égard, une grande latitude d'appréciation : il pourrait, suivant les circonstances, voir dans le défaut de comparution du Défendeur (ici Boudreau a comparu et a été à même de contester) une *renonciation tacite* à l'exception qui lui compète." (3) Le même auteur avait dit avant, sous le même No., mais à la page 43 : " Mais la sphère du Juge grandit lorsque la partie qui aurait pu opposer une exception fait défaut. On ne peut plus dire alors que la partie qui a fait défaut a tacitement renoncé à faire valoir une exception : il est au contraire de principe que le défaut emporte contestation." C'est après cela qu'il dit que le défaut est laissé à l'appréciation du Juge, suivant les circonstances. Boudreau est dans une position pire que s'il avait fait défaut, car il a comparu, et il n'a tenu qu'à lui de contester ; mais prenons cela pour un défaut, et disons si l'on veut, que ce défaut emporte contestation. Où est l'affidavit ? Il n'y en a pas, et cependant il est de rigueur, et sans affidavit les allégations de la déclaration, et les documents qui servent de base à la demande, sont présumés vrais. Il a été objecté à la preuve testimoniale, ou du moins à la partie qui a rapport à une reconnaissance de la part de Boudreau, qu'il demeurait responsable du paiement de la traite. Une telle preuve est admissible par le droit anglais. Il ne s'agit pas là de prouver contrairement à un écrit. Il doit donc y avoir jugement contre tous les Défendeurs, l'effet du statut cité, ch. 83, sec. 86, étant le même contre W. A. Starnes et Cie que contre Boudreau. Jugement rendu le 8 Avril,

(1) Le protêt d'un billet promissoire sera considéré suffisant, bien qu'il apparaisse irrégulier a sa face, si, avec le plaidoyer invoquant son insuffisance, il n'est pas produit d'affidavit. On ne peut prouver par témoin qu'une partie à un billet promissoire a renoncé à tout recours contre l'endosseur. (*Chamberlin* et *Ball*, C. B. R., Montréal, 1 décembre 1860, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., MEREDITH, J. et C. MONDELET, A. J., cassant le jugement de C. S., Sherbrooke, 18 juin 1859, SHORT, J.. 9 *R. J. R. Q.*, p. 52),

(2) Un défendeur, poursuivi comme endosseur d'un billet promissoire, ne peut prouver que l'avis du protêt du billet ne lui a pas été régulièrement donné, s'il n'accompagne pas son plaidoyer, alléguant cette irrégularité dans l'avis, de l'affidavit requis par la sec. 87 du ch. 44 des S. du C. de 1857, 20 Vict. *Ryan et al.* et *Malo*, C. B. R,, Montréal, 2 décembre 1861, LAFONTAINE, J. en C., AYDWIN, J., DUVAL, J., MEREDITH, J., et MONDELET, J., (dissident), confirmant le jugement de C. S., 10 R. J. R. Q., p. 117.) Voir 145 C. P, C. et 1223 C. C.

(3) King-Basse, de l'office du Juge en matière civile, p. 44, No. 49.

1865, contre tous les Défendeurs, solidairement, pour $1102.45, int. sur $1099.38 du 21 octobre, 1860, et sur $3.07 du 24 octobre, 1864, et dépens. (15 *D. T. B. C.*, p. 276.)

McDougall, pour la Demanderesse.

De Niverville et Bourdage, pour les Défendeurs.

ENREGISTREMENT DE VAISSEAU.—INTERVENTION.— DEPENS.

Banc de la Reine, en Appel, Montréal, 9 septembre 1864.

Présents : Duval, Juge-en-Chef, Meredith, Drummond, Mondelet et Badgley, Juges.

Mulholland, Appelant, *et* Benning *et al.*, Intimés.

Jugé : 1° Que l'enregistrement d'un vaisseau dans la vue d'en transférer la propriété doit être fait par le collecteur des douanes, et non par son député.

2° Que, dans l'espèce, l'enregistrement fait n'a pu transférer la propriété du vaisseau saisi.

3° Que le désistement de la demande principale ne peut mettre fin à une intervention ayant pour objet de revendiquer la chose saisie en vertu de la demande principale.

4° Que les intervenants, n'ayant pu établir leur titre sur l'inscription de faux produite dans la cause, doivent être condamnés aux dépens.

Le 8 septembre, 1859, l'Appelant, Mulholland, prend une saisie-arrêt avant jugement contre le Défendeur Cantin, de Montréal, constructeur de vaisseau, pour une somme de $1775.10. Le seul meuble saisi est un bateau à vapeur à hélice, en voie de construction et en partie fini, " tel qu'il est maintenant mouillé dans les eaux du canal Lachine, sur le bord d'icelui, et amarré à la propriété occupée par le Défendeur." Les intimés, Benning et Barsalou, interviennent, réclamant la propriété du bateau qu'ils disent avoir acheté de Cantin, par acte du 23 mai 1859, Doucet, N. P., au prix de £4,000, dont £3,000 antérieurement payés. Ils ajoutent que, depuis, ils ont toujours eu la possession du vaisseau, lequel était demeuré dans les chantiers de Cantin jusqu'à sa mise à l'eau, qui eut lieu deux jours avant la saisie, savoir : le 2 septembre 1859, jour auquel Benning et Barsalou prirent le bateau sous leur propre charge et préposèrent un individu à sa garde, et que cet individu l'avait sous ses soins, lors de la saisie de Mulholland. Le lendemain de la mise à l'eau, et le jour précédant la saisie savoir, le 7 septembre, 1859, Benning et Barsalou prirent les dispositions requises par la 8e Victoria, ch. 5, pour l'enregistrement des vaisseaux firent procéder au mesurage du vaisseau, et, le 8, ils donnèrent la déclaration assermentée requise au bureau de la douane, le vaisseau ayant été enregistré sous le nom de *West.* Mulholland, le Demandeur, répondit

à l'intervention, en alléguant que Cantin était en déconfiture longtemps avant la vente du vaisseau ; que Cantin devait les £3,000 à Benning et Barsalou, pour avances de deniers à lui faites par ces derniers, généralement et sans aucun rapport avec le vaisseau en question, que Cantin avait construit ce vaisseau avec ses propres deniers, et ceux de ses créanciers, et avec des matériaux obtenus à crédit de diverses personnes, et de l'Appelant, entr'autres, mais non pas avec les deniers ou avances et pour le compte de Benning et Barsalou ; que la vente n'avait pas été enregistrée suivant la loi ; qu'elle n'avait été faite que pour donner aux Intimés, dont l'un est parent de Cantin, une préférence illégale et frauduleuse, au préjudice des autres créanciers ; enfin que la tradition du vaisseau était simulée, et que Cantin en avait la possession lors de la saisie. Le 26 décembre 1859, l'Appelant s'inscrit en faux contre le certificat de propriété du *West*, signé et certifié par Tancrède Bouthillier. Au nombre de ses moyens de faux se trouve le fait que la déclaration de Benning et Barsalou, comme propriétaires, requise par le statut, comme formalité préliminaire, a été donnée devant F. Crispo, premier commis et député collecteur, tandis que le certificat paraît être signé par le collecteur lui-même, T. Bouthillier, et que, d'après la loi, le collecteur est seul autorisé à recevoir ces déclarations. La Cour Supérieure ajourna la décision sur l'inscription de faux à la décision finale du mérite de l'intervention. Pendant le cours de l'instruction de la cause, Cantin paya à Mulholland le montant de sa créance, et Mulholland dechargea Cantin de l'action qui se trouva de fait anéantie. Mais la procédure sur l'intervention et l'inscription de faux se poursuivit entre Benning et Barsalou, les intervenants, et Mulholland, le Demandeur, sur la question des frais. La Cour Supérieure (SMITH, Juge) rendit son jugement, le 26 avril 1861, par lequel elle déclara que le Demandeur n'ayant plus d'intérêt dans la cause, attendu que le Défendeur l'avait payé de sa dette, intérêt et frais d'action, le litige se trouvait par ce fait éteint ; que la cour n'avait plus de juridiction pour prendre connaissance de la cause, et qu'il n'y avait plus d'instance ; que l'intervention n'étant qu'un incident de la demande en chef, elle finit avec l'action principale ; et la cour se refusant en conséquence à adjuger sur le droit de propriété de Benning et Barsalou, et à statuer sur les dépens encourus, ordonna radiation de l'inscription au mérite sur les deux demandes. Le jugement de la Cour Supérieure est comme suit : " The Court having heard the parties upon the merits of the *inscription en faux* and of the intervention by James Benning and Barsalou ; Considering that it appears by the record, and is admitted by the parties, that Plaintiff has been paid by Defendant the full

amount of the claim sued for, in debt, interest and costs, and that, by such payment in full, the *litige* between Plaintiff and Defendant is terminated and at an end, *éteint*; and, further, considering that, by such extinction of the *litige*, the attachment made under the *arrêt-simple* became and was dissolved, and the Court is precluded from adjudicating thereupon; and, further, considering that the intervention filed by the intervening parties cannot be considered as a separate *instance* from that of the *demande en chef*, but is simply dependent on, and incidental to, the *demande en chef*, and that, by law, the principal being at an end, all accessories thereto terminate with it. And, further, considering, that, by the conclusion of the intervention, a right of property is claimed under the pretension that the *arrêt-simple* issued by Plaintiff to attach, by purely conservatory process, the property of Defendant to await the future judgment of the Court, forms part of the litigation embraced within the action of Plaintiff, whereas, in fact, the action is to recover a sum of money only; and, further, considering that the conclusions of the intervening parties, are not in any way connected with the conclusions taken by Plaintiff in his action, and that no right of property can in any way be adjudicated upon in the action of Plaintiff, and that such right of property in anything taken or attached by *arrêt-simple* cannot be in such action considered; the Court doth discharge; the inscription on the merits on both demands, and doth leave the parties to take such proceedings for taking the cause out of Court, under the provisions of the settlement referred to, as they may be advised." C'est de ce jugement que le Demandeur interjeta appel, les intervenants ayant de leur part interjeté un contre appel. Le jugement de la Cour d'Appel est comme suit: "The Court, considering that it is established by the evidence adduced that, at the time of the suing out of the writ of *saisie-arrêt*, Augustin Cantin, the Defendant, was indebted to Appellant in the sum of $1775.70, which sum of money, with interest and costs, Cantin, subsequently, admitted by Appellant, paid to Appellant, who accepted thereof, without waiver of his right to continue the proceedings on the issues raised and perfected by the pleadings filed to the demand in intervention of Benning and Barsalou, in order to obtain a judgment: Considering that, at the time of the seizure made of one screw propeller steamboat, partly finished, with engine, boiler, chain cables, windlass and all thereto appartaining, in virtue of the writ of *saisie-arrêt*, Cantin, was in possession of the said screw propeller steamboat, partly finished, with engine, chain cable, windlass and all thereto appartaining, and that the seizure so made thereof was legal; seeing that, at the time of

the sale of the said screw propeller steamboat, partly finished, with engine, boiler, chain cables, windlass and appurtenances alleged to have been made by Cantin to the intervening parties, Benning and Barsalou, Cantin was and had been, for sometime, notoriously insolvent, and that such was not followed by delivery to Benning and Barsalou, intervening parties, but that the said screw propeller steamboat, partly finished, with engine, boiler, chain cable, windlass and appurtenances, remained in the possession of Cantin; considering that, by reason of the premises, Appellant was entitled to a judgment on the issue so raised and perfected by the pleadings filed by Appellant to the demand of the intervening parties; considering, further, that the allegations contained in the demand in intervention of Benning and Barsalou were unfounded in fact, and that the demand in intervention ought to have been dismissed, with costs, and that, in the judgment pronounced by the Superior Court, at Montreal, on the twenty-sixth day of April 1861, discharging the inscription on the merits on both the principal demand and the demand in intervention, there is error, this Court doth reverse, annul and set aside the judgment so pronounced by the Superior Court, at Montreal, on the 26th day of April, 1861, and doth hereby dismiss the demand in intervention of Benning and Barsalou. And this Court, proceeding to pronounce judgment on the demand of Appellant for the costs incurred on the *inscription en faux;* considering that the allegations of Appellant, in support ofhis *inscription en faux,* were well founded in fact, and that judgment in favor of Appellant, for the costs by him incurred on said inscription ought to have been given, this Court doth condemn Benning and Barsalou to pay to Appellant the costs by him incurred on the *inscription en faux.* The Court, considering that it is established by the evidence that, at the time of the suing out of the writ of *saisie-arrêt* issued by Respondent, Plaintiff in the Court below, of one screw propeller steamboat, partly finished, with engine, boiler, chain cable, windlass and all thereto appertaining, Cantin was in possession of the said screw propeller steamboat, partly finished, with engine, boiler, chain cables, windlass, and all thereto appartaining, and that the seizure thereof, under the said writ of *saisie-arrêt* was legal; seeing that, at the time of the sale of the said screw propeller steamboat, partly finished, with engine, boiler, chain cable, windlass, and all thereto appertaining, and appurtenances, alleged to have been made by Cantin to the intervening parties, Cantin was and had been for some time notoriously insolvent, and that such sale was not followed by delivery to the intervening parties, but that the said screw propeller steamboat, partly finished, with engine,

boiler, chain cable, windlass, and all thereto appertaining, and appurtenances, remained in the possession of Cantin; considering that, by reason of the premises, Respondent was entitled to a judgment on the issues raised and perfected by the pleadings filed by Respondent to the demand in intervention of the intervening parties; considering that the allegations contained in the demand in intervention of the intervening parties were unfounded in fact, and that said demand in intervention ought to have been dismissed, with costs, and that, in the judgment pronounced by the Superior Court, at Montreal, on the twenty sixth day of April 1861, discharging the inscription on the merits on both the principal demand and on the demand in intervention, there is error, this Court doth reverse, annul and set aside the Judgment, and doth hereby dismiss the demand in intervention of the intervening parties. And this Court, proceeding to pronounce judgment on the demand of Respondent for the costs incurred on the *inscription en faux:* Considering that the allegations of Respondent, in support of his *inscription en faux*, were well founded in fact, and that Judgment in favour of Respondent, for the costs incurred by him on the said *inscription en faux*, ought to have been given, this Court doth condemn the intervening parties to pay to Respondent the costs by him incurred on the said *inscription en faux.* The Honorable Justices MONDELET and DRUMMOND, *dissenting.* (15 *D.T.B.C.*, p. 284.)

ABBOTT et DORMAN, pour l'Appelant.

LAFLAMME, LAFLAMME et DALY, pour les Intimés.

BAPTISM CERTIFICATE.—EVIDENCE.

COURT OF QUEEN'S BENCH, Montreal, 9th September, 1864.

In Appeal, from the Superior Court, District of Montreal.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, J., DRUMMOND, J., BADGLEY, J.

SKIFF FAREWELL SYKES, *Defendant in the Court below*, Appellant, *and* SARAH CAROLINE SHAW *et al.*, *Plaintiffs in the Court below*, Respondents.

Held: 1o. That an entry of a baptism in a non-authentic register where mention is made of the date of the birth of the person baptized, signed by both parents, is only *primâ facie* proof of the birth at that date, and such date may be contradicted and disproved by oral testimony. (1)

2o. That a deed must stand unrevoked and good and valid in law, until revoked in the presence of all the parties thereto.

(1) V. art. 1234 C. C.

The following were the issues between the parties: In April,
1859, Respondents instituted a petitory action againts Appel-
lant setting forth by their declaration, " That, in 1811, Noah
" Shaw was a resident of Montreal, and had his domicile
" there, and contracted marriage in the United States, about
" the 21st january, 1819, with Frances Durgen, with the
" intention of continuing his domicile in Montreal, and
" returned there; and that, thereby, a community of property
" was created between them; that, after the marriage, and
" during the community, Noah Shaw acquired a certain
" property, part at sheriff's sale on the 9th december, 1830,
" described as " A lot of ground in St. Ann's Suburbs, in the
" city of Montreal, being lot No. 90, containing 45 feet in
" width by 90 feet in depth, bounded, in front, by Nazareth
" street, on one side by Justice Smith, on the other side by
" Noah Shaw, and in the rear by the representatives of Nahum
" Mower;" and the remaining portion of the said property
" being purchased by Noah Shaw from Thomas McCord by
" deed of sale before Jobin and colleague, notaries, *on the*
" *30th October*, 1818, the said two portions being known and
" described as " A piece or lot of ground situate in this city,
" measuring 66 feet, english measure, in front, by 90 feet in
" depth, bounded in front by Nazareth street, in rear partly
" by Noah Shaw and partly by William Thornton, on one
" side by Noah Shaw, and on the other side by a lot in the
" possession of Defendant," to which said lot of land Frances
" Durgen had a right for one undivided half; that Frances
" Durgen died on the 9th October, 1840; that the only issue
" of Noah Shaw with her is Sarah Caroline Shaw, born on
" the 19th October, 1828, and who, by the death of her mother,
" was seized of all the estate of her mother; to wit, her share
" in the community, by virtue of the last will and testament
" of Frances Durgen, subject to the condition therein men-
" tioned; that, by the last will and testament, executed before
" Hunter, notary, and witnesses, at Montreal, the 12th August,
" 1840, Frances Durgen bequeathed all her property, real and
" personal, to Noah Shaw, to have and enjoy as his own pro-
" perty for ever, with the condition, that, in case Noah Shaw
" should marry again, then the will of Frances Durgen was,
" that the one-half of all the property above bequeathed
" should immediately revert to and belong to the children
" born or to be born of the marriage; that Noah Shaw after-
" wards contracted marriage, on the 1st november, 1849, with
" Eliza Anne Fackerell, and thereby the one undivided fourth
" of all the property of the community vested in Sarah Caro-
" line Shaw, who became thereby seized, as the sole proprie-
" tor, of one undivided fourth of the lot of land above men-

" tioned; that Sarah Caroline Shaw contracted marriage with " her husband, Edward Sharpe, on the 3rd september, 1846, " without any contract in writing; and is duly separated from " him as to property by judgment of the court; that Defen- " dant hath unjustly obtained possession of the undivided " fourth of the lot, and refuses to deliver it up to Plaintiffs. " Wherefore Plaintiffs pray, that Defendant may be condemn- " ed to deliver it up to Plaintiff as proprietor thereof, and that " the said lot of land may be divided: and that, if it cannot " be divided, that the sale thereof be proceeded to by licita- " tion, and the proceeds divided according to the rights of the " parties." The Respondents fyled a certificate of the marriage of Noah Shaw with Frances Durgen, at Tamworth, in the State of New Hampshire, U. S., *on the 21st February*, 1819; and a paper writing, purporting to be a certificate of the baptism of Noah Alpheus and Sarah Caroline Shaw, but which, by the judgment of the Court below, on the inscription *de faux* confirmed by the judgment of this court, has already been declared not to be an " Extract carrying with it authenticity." To this action Appellant pleaded, " that by " deed of sale, before Doucet and colleague, at Montreal, on " the 11th August, 1855, he acquired from Noah Shaw the " piece or lot of ground of 66 feet front by 90 feet in depth; " that only part of it was acquired after the marriage of " Noah Shaw with Frances Durgen, to wit, " Forty-five feet " in front on Nazareth street, by ninety feet in depth, the " remaining portion, twenty one feet on Nazareth street, " ninety feet in depth, having been acquired by Noah Shaw " before his marriage by deed of sale from Thomas McCord " to him, before Jobin and colleague, notaries, on the 30th " October, 1818; that Sarah Caroline Shaw was born on the " 19th september, 1828, and not, on the 19th October, 1828; " and, that the Plaintiff's Exhibit No. 4 was not an extract, " such as it purported, namely, from the register of the Ame- " rican Presbyterian Church; that, on the 21st September, " 1849, at Montreal, in and by a deed of sale executed by and " between Edward Sharpe and Sarah Caroline Shaw, then of " full age and being the wife of Edward Sharpe, and by him " duly authorized, and Noah Shaw, before Griffin and col- " league, notaries, it was declared as follows: " That, whereas Frances Durgen, in her lifetime wife of Noah Shaw, and mother of Caroline Shaw, departed this life on or about the ninth day of October, 1840, having previously thereto made her last will and testament before Hunter, public notary, and two witnesses, bearing date the twelfth day of August in the last mentioned year (to wit: the last will and testament of Frances Durgen), and, amongst other things in her said last

will and testament contained, did will as follows, to wit: "I give, devise, and bequeath to Noah Shaw, my husband, all the property, either moveable or immoveable, real and personal, plate and plated ware, debts and actions, whatsoever, wherever the same may be situated, and to whatever amount the same shall come, to me in any wise belonging and appertaining, or in which I may have any right, interest, and share, at the day of my death, without any exception or reserve. To have and to hold, receive, take, and enjoy, and dispose of, the said before mentioned and intended to be hereby bequeathed premises unto Noah Shaw, my beloved husband, his heirs and assigns, as his and their own property, for ever. It is my wish, however, that in case Noah Shaw shall, after my death, contract a second marriage, then, and in such case, my will is, that one-half of all the property above bequeathed shall immediately revert to, and belong to, the children, born or to be born, issue of my marriage with Noah Shaw, to be divided between them share and share alike." And whereas, since the decease of Frances Durgen, Caroline Shaw (her only child), issue of her marriage with Noah Shaw, her surviving, has been united in the holy bonds of matrimony with Edward Sharpe, and, since their marriage, Noah Shaw has, at divers times, lent and advanced and paid unto Edward Sharpe and Caroline Shaw, his wife, divers sums of money for and towards their household and domestic and personal expenses. And whereas, in consideration of the love and affection which Caroline Shaw bears towards her father, and also for other the considerations hereinafter mentioned, Edward Sharpe and Caroline Shaw, his wife, have agreed to relinquish all and every interest, contingent or direct, which Caroline Shaw hath or may be supposed to have, under the last will and testament or otherwise, into or upon the estate and succession of her deceased mother, and to assign the same to Noah Shaw, her father. Now, it is witnessed, by these presents and by us the undersigned public notaries, that, in consideration of the release, acquittance, and discharge which Noah Shaw hath given and granted, and, by these presents, doth give and grant, unto Edward Sharpe and Caroline Shaw, accepting thereof, of and from the payment of the aforesaid several sums of money, amounting together to the sum of £501 15, by him Noah Shaw heretofore lent and advanced unto and paid for Edward Sharpe and Caroline Shaw, his wife; and also in consideration of the further sum of thirty-two pounds, which, at the execution of these presents and in presence of us, notaries, Noah Shaw hath paid unto Edward Sharpe and Caroline Shaw, his wife, the receipt whereof they do hereby acknowledge, Edward Sharpe and Caroline Shaw, his wife, by him

duly authorised, have granted, bargained, sold, assigned, and confirmed, and by these presents do grant, bargain, sell, assign, and confirm, unto Noah Shaw, accepting thereof, for himself and his heirs, executors, and administrators and assigns, all and every the right, title, interest, claim, and demand, contingent and otherwise, which Caroline Shaw had or hath, or which she may be supposed to have had or have under and by virtue of the last will and testament of Frances Durgen, her mother, or otherwise, in, to, or upon the estate and succession of Frances Durgen; to have and to hold the same, and every part and portion thereof unto Noah Shaw, his heirs, executors, administrators, and assigns, as of his and their own *indefeasible* estate and property, for ever. Edward and Caroline Shaw, his wife, putting, placing, and subrogating Noah Shaw, his heirs, executors, administrators, and assigns, in all and every their and each of their rights and actions, *droits, noms, raisons et actions*, in the premises, and constituting him and them their attorney and attorneys, irrevocable in the premises. "That, by reason of the premises, Plaintiffs, for the " consideration, amongst other things, of the sums of £501 15s. " and £32, forming together the entire sum of £533 15s. so " paid to Plaintiffs, as, in the said *acte* or deed of sale mentioned, sold, assigned, transferred, and made over to Noah " Shaw, all the right, title, interest, claim, and demand in and " to the said peace or lot of ground, as well as to all other the " property to which Sarah Caroline Shaw and Edward Sharpe, " her husband, or either of them, in any way may have become entitled, under the last will and testament of Frances " Durgen. Wherefore Defendant prays Plaintiffs' action be " dismissed with costs." To this plea, Respondents answered, that Noah Shaw could not legally sell the lot of land in question to Appellant; that it was made in fraud of his creditors, when he Noah Shaw was insolvent; that it was not true, that Sarah Caroline Shaw was born on the 19th September, 1828, but on the 19th October, 1828; that Respondents having proved the date of the birth by the duly certified extract from the register of the church, according to the forms required by law, Appellant could not attack the authenticity of it, except by an *inscription en faux*; that the deed of sale and relinquishment was null; that Sarah Caroline Shaw was a minor at the time of the execution of it; that Noah Shaw was her tutor or guardian, and had made no inventory; that he had never paid any value or consideration, as falsely alleged in the deed of sale and relinquishment; that it was obtained fraudulently; that, besides, it contained a sale of the rights which Sarah Caroline Shaw might pretend in the succession of her mother, Frances Durgen, in virtue of her

last will; that such an alienation was null, Sarah Caroline Shaw being at the time a minor. The judgment of the court below was as follows: The 30th September 1862. Present: The Honorable Mr. Assistant-Justice MONK, "The court, considering that Defendant hath not established, by legal and sufficient evidence, the allegations of his plea, doth overrule and dismiss the same, and, considering that, at the time of making and entering into the deed of sale or transaction, dated the twenty-first day of September, 1849, executed before Maître John C. Griffin and his colleague, public notaries, from Sarah C. Shaw to her father Noah Shaw, Sarah C. Shaw had not attained the age of twenty-one years; seeing, consequently, that the said deed of sale or transaction is entirely null and void in law; and, considering that Plaintiffs have proved, by legal and sufficient evidence, the allegations of their declaration, doth maintain the action and demand of Plaintiffs, and doth declare Sarah Caroline Shaw, one of the Plaintiffs, to be, under and in virtue of the last will and testament of Frances Durgen, her mother, deceased, the proprietor of and entitled to the one undivided fourth part of "a piece or lot of ground situate in this city measuring sixty-six feet english measure in front, more or less, by ninety feet in depth, bounded in front by Nazareth street, in rear partly by Noah Shaw, and partly by William Thompson, on one side by Noah Shaw, and on the other side by a lot in the possession of Defendant." And the court, proceeding to adjudge upon the conclusions of the declaration of Plaintiffs, doth condemn Defendant to quit, abandon, restore, and deliver up the undivided fourth of the said lot of land to Plaintiff, Sarah Caroline Shaw, as proprietor thereof, and entitled to have and possess the same under the said last will and testament, and to pay over to Plaintiff, Sarah Caroline Shaw, the rents, issues and profits thereof, if any, and in order that the said lot of land may, under the authority of this court, be divided, it is ordered that the said lot of land be, by competent persons, experts, agreed upon by Plaintiffs or Defendant, or, in their default, named by this Court or a judge thereof in vacation, examined, seen and valued, in order to ascertain and establish the part that ought to belong to each of the parties in the said lot of land, to the end that the said lot of land may be divided into portions equal and according to the respective rights of the said parties, and in case that the lot of land cannot be divided in a manner corresponding with the respective rights of the parties, then, it is ordered that the sale thereof shall be proceeded to by licitation to the last and highest bidder, in the usual and accustomed manner, and after the usual and accustomed notices and advertisements, and the price thereof divided between the parties according to their respective rights and shares, reserving to

Plaintiffs the right of taking such other conclusions as may be necessary during the course of proceedings.

BADGLEY, J., giving judgment in appeal: This is a petitory action instituted by Plaintiffs to recover, for the female Plaintiff, from Defendant, her share of property, in the lot of land described in the declaration, which is claimed from Defendant as the purchaser from her father, Noah Shaw and to which as forming part of the community of property between her father and mother, she alleges herself to be entitled as legatee of her mother's rights in that community under her last will. Noah Shaw and Frances Durgen, the father and mother of female Plaintiff were married in 1819, and, by effect of that marriage, a community of property was established between them by the operation of law. During their cohabitation, children were born to them, of whom Plaintiff was the sole survivor of their mother, and property was acquired by them, of which the law gave the mother a moiety, which, by her last will, she disposed of by giving all her rights to her husband, except upon the contingency of his second marriage, naturally concluding that, except in that event, her child would not be deprived of her property; the condition, upon the event of such second marriage, was that one-half of her share of the community should revert and belong to her surviving child. That community included a portion of the real property in contestation. Mrs. Shaw died on the 9th October, 1840; her will is dated in August of that year. By a notarial deed, dated the 21st September, 1849, executed between Noah Shaw, the father, and Plaintiffs, his said daughter, and her husband, the latter, in consideration of £32 then paid to them by him, and of a sum of upwards of £500 alleged to have been previously paid to them by Shaw, the receipt of which sums they thereby acknowledged and from which they discharged him, relinquished to her father every right and interest, contingent or absolute, that she could claim under her mother's will, and assigned and conveyed her right and interest therein to him, thereby, of course, selling and conveying to him all her property in the lot of land aforesaid. On the first of November following, a few days after the execution of the deed, Shaw contracted a second marriage, and, on the 11th of August, 1855, he sold to Defendant the reality in question, which has given occasion to this action against the latter as the holder thereof. The Defendant pleaded her deed of relinquishment and discharge to her father, and her want of claim in consequence against him as the purchaser from her father under her title. In reply to the plea of her said deed, she alledged her then minority, and the consequent nullity of the deed as to her, and further the legal nullity of

that transaction as having been made between pupil and tutor without account made or vouchers produced; but she did not conclude or pray for the revocation of that deed. Upon the first point, as to her minority and being under age at the date of the deed, it may be premised, that the question is important, not so much only as regards the female Plaintiff, but as it regards the faith and credibility to be attached to church registers from the presumed knowledge of the age of their children, declared in the registry by their parents. The leading fact at issue between the parties is the time of the birth of female Plaintiff, whether she was born on the 19th September, 1828, as alledged by Defendant, whereby she would have been of age at the date of the deed, or on the 19th October, 1828, as alleged by her, which would have made her a minor at the date of the deed, both of which dates carrying the controversy to a fact taking existence upwards of 30 years ago. The Plaintiffs support their assertion by an entry in a book, kept as a Church Register of the American Presbyterian Church in this city, under date of 2nd January, 1832, in which she is declared to have been born on the 19th of October, 1828, and this entry is signed by Noah Shaw, the father, Frances Durgen, the mother, Sally Durgen, the grandmother, and certified by the signature of the then minister of the church, the Rev'd. G. W. Perkins. The original entry is as follows: "Noah Alpheses, "and Sarah Caroline, children of Noah Shaw, carpenter, "living in the District of Montreal, and Fanny Durgen his "wife: Noah born on the first of October, eighteen hundred "and twenty, and Sarah, born on the nineteenth of October, "eighteen hundred and twenty-eight, were baptised the second "of January, eighteen hundred and thirty-two, by (signed) "G. W. PERKINS, Minister. NOAH SHAW, FRANCES DURGEN, "SALLY DURGEN, MARY ANN PERKINS." The signatures of the parties, father, mother, and grandmother are proved, and it is also proved that, although the book is not a legal register, entitled to full authenticity, according to the laws of the province, it has always been considered to be the first of the registers of that church, and kept as such by Ministers of the church for the time being. It need scarcely be observed that, being unauthentic, the declarations contained in that register are subject to contradictory proof, and to be disproved in the same manner as upon *inscription de faux*, authentic registers are liable to objection and contradictory proof, but, in both cases, admitting those declarations *jusqu'à preuve contraire* as *prima facie* evidence. The declared entry on the register of her baptism, dated the 2nd January, 1832, subject to this test, is, that she was declared to have been born on the 19th October, 1828, nearly three years and four months previous to her baptism:

moreover, there is no evidence to show when, by whom or in what terms the declaration was made, or whether it had been read to or by the signers before they signed it. There is some misapprehension upon the subject of the absolute evidence afforded by a register, but the authorities are clear that full faith is due to it only to a certain extent. The Ordinance of 1667, title 20, in several of its articles, makes special provision for and requires special facts to be stated in the registrations of baptism, marriage and burial, and to these facts the law attaches full faith. But the register is also required to contain certain declarations, such, amongst others, as the day of the birth of the person baptised, the day of the death of the person buried, which, as Dumoulin observes, are things *quæ non fiunt nec disponantur, sed tantum rescituntur*, and, of these declarations, Ancien Denizart, vbo Baptême says, at p. 23 : " Il est essentiel de remarquer dans cette opération, (Baptême) les pasteurs ou ceux qui les représentent ne sont juges de rien, ils n'ont rien à prononcer, ils n'ont qu'à consigner dans le régistre ce qui a été dit et ce qui a été fait." Bonnier, *de la preuve*, p. 465, says : " telles personnes ont " déclaré l'existence de tels ou tels faits au fonctionnaire, etc, " mais nullement que ces faits déclaratoires soient conformes " à la vérité ; ce dernier point ne serait établi que jusqu'à " preuve contraire : " and, at p. 473 : " l'acte de baptême prouve " jusqu'à l'inscription de faux que tel enfant a été présenté, que " telles déclarations ont été faites etc. sur l'époque de la nais- " sance, qu'on lui a donné tel nom etc.; quant aux déclarations " elles-mêmes, elles ne font foi que jusqu'à preuve contraire, " etc.," and Rodier, in his notes on the 9th, 10th and 14th articles of the ordinance, which bear upon this matter of the registers, shows that, if errors exist in them, they may be corrected ; that the correction may be made from verbal testimony, but only by Royal Judges or *juges de parlement*, not by *juges de seignieurs*. He shows that the enunciations of age are not absolute proof of the fact, but only *prima facie* evidence. He says : " supposons qu'en baptisant un enfant nommé " Jean, on eût écrit Pierre, ou qu'on eût écrit que Jean Croc a " été baptisé, marié ou enseveli, le 15 mars, 1750, et que ce fût " néanmoins un autre jour, dans un autre mois ou dans une " autre année, ou enfin qu'on eût fait quelqu'autre erreur, il " n'est pas juste que la partie en souffre. On peut ordonner " cette réforme d'erreur ou incidemment à un procès ou indé- " pendemment de tout procès." The same good common sense which makes the declaration of age, if erroneous, subject to correction by the effect of disproof, is to a larger extent adopted in the English law, to which I refer, casually, as regards the proof of the fact of the age. The English law refuses the decla-

ration altogether, and as laid down in 2nd Taylor,on Evidence, p. 1403, No. 1877: A register of baptism is evidence of the fact of baptism, and of its date, but it furnishes no proof of the time of birth, although it state that fact. R. vs. Clapham, 4 Carr. and P., 29, and the principle is confirmed in 6 Carr. and P.,196; 3 Starke R.,63; 6 M, and W., 166; 7 East. R. Now, although in the authenticated register, the declaration of age is taken as *primâ facie* evidence *jusqu'à preuve contraire*, that is founded on the first of the necessity of baptizing the infant immediately upon birth, according to the dogmas of the Roman Catholic Church, so that, between birth and baptism, in Roman Catholic countries, and especially in France, where the Ord. of 1667 first was law, no appreciable interval existed; so, also, under the modern law of France, the declaration of the birth is required to be made to the public officer within three days, in both cases forming a very strong presumption of the truth of the fact; whilst, in this case, an interval of upwards three years and a quarter intervened before baptism. This certificate stands self-supported as *primâ facie* evidence only, the signatures of the parents and grandmother strengthen that evidence, because they may be assumed to have knowledge upon the subject, particularly the mother, and all of them at the time must have been entirely free from all interest to record or certify a falsehood. But against this presumptive and *primâ facie* evidence, is produced oral and written testimony of facts, which conflict with it very materially. The oral testimony adduced is 1st, of two women, the female neighbors and acquaintances of Mrs. Shaw, who saw and conversed with her, and saw and handled the child within twenty-four hours of its delivery; 2nd, of the midwife who assisted at her delivery; lastly, of Noah Shaw, the father of the child, and, in connection with this, the written evidence afforded by the entry made by the late Doctor Coldwell, in his account-book of his surgical attendance, upon the occasion in question. The two female witnesses testify, as to the birth, that the delivery was troublesome and required to be affected by *forceps;* that Mrs. Shaw herself told them of the delivery by forceps, of the difficulty she had suffered, and of the *presence of the* doctor to assist: and Mrs. Stuart, the midwife, although very aged, remembers well having attended upon Mrs. Shaw, at the birth of the Plaintiff, whom she has known ever since, and whom she also delivered of her first child. Mrs. Stuart also mentions the attendance of Doctor Caldwell and his use of instruments. Both these neigbors fix the time from circumstances which give strong credibility to their testimony, the birth of their own children and the circumstances attending them. Mrs. Briggs, fifty-six years of age, speaks positively of

the time of the *accouchement*, upon a calculation of the birth of her own child, of which there can be no possible mistake; and she declares the birth of her child, to have been four months and a few days, seven or eight days, before Plaintiff's birth, and she produced the baptismal certificate from the Roman Catholic registry, showing that her child was born on the 7th May, 1328, which would make Plaintiff's birth to be in September, certainly in the middle of that month. Mrs. Cutler, sixty-three years of age, says her first child was born on the third of August, 1829, ten months and a half after the birth of Mrs. Shaw's child; she had been married in 1828; she visited Mrs. Shaw the day after the delivery; Mrs. Shaw told her of her difficulty and of the presence of the doctor; she says that Mrs. Stuart was the attending midwife, that she herself became *enceinte* only six weeks after this visit, and was delivered ten months and a half after Mrs. Shaw; this would also bring the delivery of Plaintiff to about the middle of September, 1828. In addition to this oral evidence is the entry made by Doctor Cardwell himself, in his usual account-book, charging Noah Shaw, under the specific date of the 19th September, 1828, with attendance for *accouchement* and delivery by forceps; substantiating the testimony of the midwife in these particulars, as well as that of the two female neighbors. As this point of the case is a matter of serious importance, it is not unreasonable or improper to receive the light and assistance of decisions outside of our particular jurisprudence. But first it must be observed that, although hesitation might attach to the doctor's entry, if it stood alone, yet, the circumstances surrounding it, and the oral testimony connected with it, are strong to show its effectiveness. The book itself is produced in evidence by Andrew Shaw, the curator appointed to the doctor's estate, shortly after his death, in 1833; and it had constantly been in his possession since that time. The curator shows the account of Noah Shaw, entered in that book, in order of date, day and year, by the doctor himself, in his own handwriting. He declares, moreover, that the doctor kept no blotter or day-book, and swears, to his belief, that the doctor kept no other entry book. The evidence of the curator is very clear, and is as follows: " I have here in my possession one of those books of account kept by the late Dr. Caldwell, which is principally in his hand-writing. I cannot divest myself of this book of account, but I am quite willing that any extracts should be taken from it. On the one hundred and sixty-fifth and the one hundred and sixty sixth pages, there are entries for medical services and medicines rendered and furnished apparently by the late Dr. Caldwell to or for Noah Shaw. The account commences on the one hundred

and sixty-sixth page, with the year 1825, and is headed Mr. Shaw, carpenter, Griffintown, and is continued over unto the one hundred and sixty-fifth page, where the following entries appear: 1828. Mr. Shaw, from the other side. May 2, Consultation, pil x 4, Mist Ziy £0,10; July 18, A visit, pil-x-28 a visit pil 18 mist 2 my £0,20; Aug. 7, Boy, a visit, pil y £0,7 Sept. 19, A visit express, and delivery by forceps £2,10,0. All of the foregoing account is in the hand-writing of the late Dr. Caldwell in the said book of account, page one hundred and sixty-five. CROSS-EXAMINED: *Question:* Did you find, amongst the books of Dr. Caldwell, any blotter, day-book, or journal out of which this account could have been made or extracted? *Answer:* No. *Question:* To your knowledge, did he ever keep any blotter, day-book, or journal out of which this account referred to could have been taken or extracted? *Answer:* No, he did not to my knowledge keep any such book. I believe he entered them only in this book out of which a *fac simile* is taken. "On page one hundred and sixty-five, wherefrom the above extract is taken, there is another account or entry close above it, without more space between them than between the first and second lines of said extract, and, immediately below said extract, there is another entry for an account, with the space of about a quarter of an inch from the said account of M. Shaw, and the date of the account above is January, 1826, and the date of the account below is February the seventeenth, 1826. I would account for this by the fact that the account must have been transferred from the opposite page, when the entries were made during the year eighteen hundred and twenty-six, to a space then remaining." It must be observed here, that, after the production of the book, at the Enquête Court, as the curator would not divest himself of it, the extract of the account contained and given in his evidence was made from it by the officer of the Court, as is invariably practised in cases where the witness is not at liberty to leave the original on file, and, in that case, the extract is taken as evidence. It must also be stated, that no objection was taken by Plaintiff at the time of taking this evidence in the Enquête Court, to the appearance of M. Shaw, the curator, as a witness, or to his production of the book at the Enquête in the cause, or to the said extract being taken from it for evidence, or to that remaining of evidence instead of the book. No motion was made at the hearing on the merits for the rejection of any part of this testimony, and it comes before this Court with the same authority and credibility attached to it as was allowed to it by the parties themselves in the Superior Court; they were willing to submit the case as it was, adopting the entry instead of the book as evidence in

that respect, and in the same manner it has been submitted to this Court. There is nothing, therefore, to cast suspicion upon this entry, which is an account of itself, independent of any other entry on any other page, and charges the doctor's services in 1828, from the 2nd May to the 19th September, added up at the total of £7 10. The estate of the doctor can have no interest in it, because it was more than thirty years old at the time of its production as evidence, and the debt was absolutely discharged by prescription, as much as if it had been marked "paid" by the doctor himself. A very similar case strongly bearing upon this point occurred in England, and is reported in 10 East, p. 109. The question there was a question of age; and to prove on what day a child was born, after a good deal of oral testimony from relatives and others had been advanced, the book of the *accoucheur* who had attended at the mother's confinement was produced by his son, who had possession of the book, his father being dead, which exhibited the charge therein for attendance on a day specific marked in the book, and the delivery by forceps; and the entry was admitted as evidence of the date of the birth. The conformity of this reported case with the one in hand is conclusive. Now then, as our law does admit and acknowledge that the declaration of age is only *primâ facie* evidence, subject to rebuttal by contradictory evidence, we have, on the one side, a mere presumption, because the date of the birth is declared in the register, and nothing more; whilst, on the other, there are facts prove, the evidence of the midwife, who distinctly remembers the birth of Plaintiff, and the delivery of her mother by Dr. C. with forceps, then the evidence of the two women, neighbours, who saw Mrs. S., almost immediately after Plaintiff's birth, who are as credible as to the birth of their own children, as Mrs. S. could be as to the birth of Plaintiff. They also state their distinct recollection of the event of Plaintiff's birth, under the management of Mrs. Stuart, the midwife; they refer distinctly to the instrumental delivery by the medical man, sworn to by the midwife, and as disclosed to the witnesses by Mrs. Shaw herself, within twenty-four hours of the event, and finally confirmed by the entry made by the doctor himself under the specific date. It is true that the birth is established by the two women from calculations, and about the time, but recollection of distant events is almost always made up by references, and, in this case, the thing from which they calculate is, I may say, an absolute certainty in the recollection of mothers, and in this case cannot admit of dispute. Taking the evidence then as it stands, Plaintiff's birth appears to be established as about the middle of September, 1828, certainly a little earlier by

three or four days than the 19th of that month; and it must also be admitted that this testimony is not obnoxious to *reproche* either of interest or partiality; all that can be objected to it is that it goes to prove a fact more than thirty years old. The testimony of Noah Shaw, the father, has not beed adverted to, and, except in proof of the signatures of his wife and her mother with his own, will be best passed over without much remark. It is obnoxious to strong reproach from interest to sustain the deed of sale and transaction of 21st September, 1849, and to prove his child's majority at the date of the deed; his testimony is in conflict with his own signature to the Registry, at a time when he had no interest to put his signature to an untruth; and, moreover, he undertakes to state a fact, which may probably be in his recollection, but which few or no fathers ever do remember, I mean the exact day of the birth of their children; fortunately for the Defendant, his other proof is sufficient of itself. The majority of Plaintiff appearing to me to be established as at the date of the deed, the instrument is not a nullity by reason of her minority at the time. The other ground of objection remains, the alleged nullity of the deed of transaction between the father and his child just out of her minority, only two days afterwards according to Defendant's statement, and without account rendered or voucher shewn. Now, whether the deed be fraudulent and *entaché de dol* or not, it stands unrevoked. How happens it that, in the many years between 1849, its date, and the institution of this action, in 1862, Plaintiffs adopted no proceedings against her father after his second marriage for the revocation of this alleged fraudulent instrument? They have allowed it to stand presumptively a good and valid deed, and even have prosecuted in this cause without putting Noah Shaw *en cause* to test its validity. The Plaintiffs plead with a stranger, the Defendant, the nullity of the deed, but do not conclude or pray for its revocation, nor that it should be declared a fraud and a nullity, but have allowed it to stand good against themselves. Under such circumstances with the deed subsisting and presumably valid, the Plaintiffs' second ground of plea cannot be sustained; both being set aside, the judgment of this Court must necessarily be in favor of Defendant, and the judgment of the Court below must be reversed.

MEREDITH, Justice: I agree with the other Judges in thinking that Sarah Caroline Shaw, (Mrs. Sharpe, one of the Respondents) was of age when she signed the deed of the 20th September, 1849, mentioned in the pleadings in this cause. The certificate of her baptism, even if it were authentic, which it is not, would be so, only as regards the act per-

formed by the clergyman as a public officer, and not as regards the declaration of private individuals as to the age of their children. In the present case, one of the children was more than 11 years old when baptized, and the other was more than three years old at that time. Under these circumstances, if the person giving the ages of the children had made a mistake of a month as to the age of one of them, it would not have been surprising; but I think it very probable that the mistake may have occurred, as suggested by the Appellant, namely, that the clergyman having to record two dates, after writing October for one of them, by mistake, for the second date, repeated October instead of September. But be this as it may, I think the presumption, such as it is, resulting from the baptismal certificate *sous seing privé* signed by Mr. Perkins, is outweighed by the evidence adduced by Appellant. I therefore pass to the consideration of the question, whether, under the circumstances of this case, the deed of the 20th September, 1849, can be treated as utterly null. And I am of opinion that it cannot. The important facts as to this part of the case are, first, that it does not appear that Sarah Caroline Shaw, when a minor, had any property of which her father had the administration either as *tutor or otherwise.* She had, it is true, a contingent interest in one half of the property left by her mother; but that interest depended upon the second marriage of her father; and that second marriage did not take place until, according to my view, after she was of age. In the second place, it does not appear that her father *was ever appointed her tutor.* And, thirdly, if the deed impugned had not been passed, the account that Noah Shaw would have had to render to his daughter, Sarah Caroline Shaw, would have been that of *grevé de substitution* in favour of the *substituée*; and not that of a *Tutor* or *protutor* to a person who had been his ward. Moreover, even if Noah Shaw had been tutor, and that he had had, as tutor, the administration of the property in question. I do not think the deed could be treated as absolutely null, in an action against a third party, without any proceeding having been taken, as between the tutor and the former ward, *pupille,* to have the deed set aside. A great number of authorities on this subject were cited in the case of Moreau and Motz. (1) Among them is a passage from l'*Ancien Deni-*

(1) Dans *Motz* et *Moreau*, le Demandeur réclamait sa part dans la succession de feue Christiana McPhee, sa mère, tant de son chef que du chef de Wm Andrew Motz, son frère, et de Catherine Motz, sa sœur, dont les droits lui avaient été cédés. Cette action était dirigée contre Henriette Moreau, veuve de Joseph Carrier, poursuivie en son propre nom et en qualité de tutrice à ses enfants, comme étant en possession des biens réclamés, à l'effet de lui faire rendre compte, de la forcer à faire un inventaire et d'opérer un partage

sart which is in the following words: "Les décharges de "compte de tutelle, quoique données *non visis tabulis, non* "*dispunctis rationibus*, ne peuvent plus être attaquées après "les dix années de leur date postérieure à la majorité suivant "les arrêts rapportés par MM. Louet, et Brodeau son annota-"teur, sous le titre T, sommaire 3. Ce temps ayant été jugé "suffisant pour que le mineur devenu majeur pût examiner "s'il avait été lézé." (1) And on reference to Louet, I find some eight or nine *arrêts* are cited in support of this doctrine; some two or three however, being also given on the opposite

et licitation. L'action avait aussi pour objet de demander l'annulation de plusieurs actes que le Demandeur anticipait lui devoir être opposés, entre autres un inventaire, diverses cessions, quittances et transactions intervenues entre les héritiers Motz et feu Joseph Carrier, leur beau-père. Le 5 septembre 1855. la Cour Supérieure, siégeant à Québec, composée de Bowen, J. en C., Morin et Badgley, Juges, rendit en faveur du Demandeur un jugement décidant les points suivants : Que tant qu'une première tutelle existe, une seconde ne peut avoir lieu, et que tous les actes faits par un second tuteur sont nuls ; qu'un inventaire fait sans y appeler le premier tuteur est nul ; que, si le subroger tuteur, qui a comparu à l'inventaire, est encore mineur, l'inventaire est nul ; que l'huissier qui a prisé les effects portés à l'inventaire, doit être assermenté, à peine de nullité de l'inventaire ; que des inexactitudes, de fausses évaluations, des recels dans un inventaire le rendent nul, et constituent en fraude celui qui l'a fait ; que toutes transactions, quittances et décharges, intervenues entre un tuteur et des mineurs devenus majeurs, ayant pour base un inventaire incorrect et frauduleux, sont nulles de plein droit ; que des transactions intervenues entre un tuteur et des mineurs devenus majeurs, sans qu'il ait été fait un bon et loyal inventaire, sans reddition de compte et sans production de pièces justificatives, sont nulles de plein droit ; que l'action rescisoire, lorsqu'il y a dol et fraude, ne se prescrit pas par dix ans ; qu'en l'absence de registres, l'état civil d'une personne peut être prouvé par témoins. Moreau ayant interjeté appel de ce jugement à la Cour du Banc de la Reine, cette cour composée de Lafontaine, J. en C., Caron, Mondelet et Short, Juges, a, le 10 mars 1857, infirmé sur plusieurs points le jugement de la Cour de première instance, et décidé qu'un mineur, qui, dans un acte, se déclare majeur, doit, dans une action demandant la nullité de cet acte à cause de sa minorité et en l'absence de pièce authentique constatant l'époque de sa naissance, prouver qu'il était mineur lors de la passation de cet acte ; que l'inventaire ne devient pas nul par le fait que l'huissier priseur n'a pas été assermenté par le notaire ; que le tuteur, usufruitier des biens légués à son pupille qui ne possède pas d'autres biens, n'étant pas tenu de lui rendre compte, peut transiger avec lui quoiqu'il n'y ait pas eu de reddition de compte ; que l'action en nullité, portée par un mineur pour faire annuler un acte de fait pendant sa minorité, se prescrit par dix ans ; que des erreurs et omissions dans un inventaire ne rendent pas cet inventaire radicalement nul, mais donnent seulement lieu à une action en rectification. Motz interjeta appel de ce jugement au Conseil Privé qui, renvoyant cet appel, a décidé qu'un mineur qui a transigé avec son tuteur pendant sa minorité, ne pourra faire annuler cet acte, si, après avoir atteint sa majorité, il a fait avec son tuteur d'autres transactions équivalant à une ratification du premier acte, surtout s'il attend le décès du tuteur pour demander cette nullité. (*Motz* et *Moreau*, 3 *R. J. R. Q.*, pp. 347, 369 et 408.)

(1) Ancien Denisart, vbo. Tutelle p. 117, No. 103, quoted by Chief-Justice Lafontaine, 3 R. J. R. Q. p. 377. See authorities cited in favour of the 10 years prescription, Same vol., p. 361. Authorities cited on other side. Same vol., p. 356, et suiv. Authorities cited by Chief-Justice, Same vol., p. 376 et 377 and by Judge Caron, same vol. pp. 390, 394, 400 à 404.

side. It is also important to recollect that the present case is a much more favourable one than those given by Louet and Brodeau, and referred to in the passage just quoted from the Ancien Denisart; for, as already mentioned, Noah Shaw the father was not tutor and had not administered any property in the right of his daughter, and further, even if he had been tutor, his administration of the property referred to in the deed impugned could not, for the reasons already mentioned, have been entered in a *compte de tutelle.* As throwing light upon this part of the case I may refer to a passage in the judgment of Mr. Justice CARON in the case of *Moreau* and *Motz* already cited. It is as follows: " Mais si le tuteur qui " n'a pas eu de biens à gérer pour son pupille, pour la raison " qu'il n'en avait pas, achète ou acquiert à tout autre titre de " ce mineur, devenu majeur, des droits qui ne lui sont pas en- " core échus, ou des biens dont il n'a pas encore la jouissance, " ou fait avec ce mineur tout autre contrat ou convention " relatifs à des biens ou affaires qui n'ont jamais été sous le " contrôle du tuteur, ces contrats, conventions on stipulations " seront-ils nuls, par suite des rapports antérieurs qui ont " existé entre les parties, et seulement parceque tels actes " n'ont pas été précédés d'un règlement de compte?" (1) And the learned Judge thus answered the question so put as follows: " La négative de cette proposition me paraît devoir être " admise sans difficulté:" and proceeds to give very satisfactory reasons and authorities in support of his opinion. On reference also to pages 376 and 377 of the same volume it will be found that the late Chief-Justice of the Court took the same views as Mr. Justice CARON of the question now being considered. The opinion thus expressed seem to me a true exposition of our law on this subject, and if we are to act in accordance with them in the present case, we cannot, in this action, against a *tiers détenteur*, treat as null the deed of the 20th of September, 1849, between Noah Shaw and his daughter, one of the Respondents.

DUVAL, Ch. J.: The principal question to be determined was the true date of Plaintiff's birth? Did it take place on the 19th September, or the 19th October. The court were of opinion that it was proved, beyond all doubt, that she was born on the 19th September, and, consequently, that she was of full age when she alienated her rights. We had first the evidence of the father himself, who stated that, according to a custom which a generally prevails, he made an entry of the date of his daughter's birth in the family Bible. This book was subsequently destroyed by fire, but Mr. Shaw declared it

(1) 3 R. J. R. Q., p. 401.

was the 19th September. There was, moreover, an extract from the account book of Dr. Caldwell, who assisted at the *accouchement*, and who also entered the birth on the 19th September. There was another fact which might be referred to. It was quite evident that the father intending to come to an amicable arrangement with his daughter, waited till she had attained the age of 21, and, as soon as he was satisfied that she was of full age, he made the contract in question. Now, it was a fair conclusion to come to that the father would not have entered into the contract, unless he had been perfectly satisfied that she had attained the age of 21. There was also the testimony of various persons who remembered the time of birth. Against this there was the church register which stated the birth to have taken place in October. On this question, the court was of opinion that Plaintiff was of full age. As to the legality of the transaction, apart from this, the court was also in favor of Defendant's pretensions. The judgment in appeal was *motivé* as follows : " Considering that it hath been established in evidence that, at the date of the execution of the deed of sale or transaction, dated the 21st day of September, 1849, before John C. Griffin and his colleague, public notaries, between Sarah C. Shaw, and Edward Sharpe, her husband, and Noah Shaw, her father, Sarah C. Shaw had attained the age of majority of 21 years ; considering that Noah Shaw is not a party in this cause, and that no proceedings have been shewn to have been taken by Respondent against him for the revocation of the said deed ; considering that the said deed stands unrevoked and in presumption of law is good and valid as between Respondents and Noah Shaw, until so revoked ; considering that, in the judgment of the Superior Court for the District of Montreal, rendered on the 30th September, 1862, whereby it is declared that Sarah C. Shaw had not attained the age of 21 years, at the time of her execution of the said deed, and that, consequently, the said deed was entirely null and void in law ; whereupon the action and demand of Respondents, were maintained against Appellant, there is error. This court, proceeding to render the judgment, which the Superior Court ought to have rendered, doth, for the reasons hereinabove mentioned, dismiss the action and demand of Respondents." (9 *J.*, p. 141 et 15 *D. T. B. C.*, p. 304.)

DAY and DAY, for Appellants.

R. and G. LAFLAMME, for Respondents.

REGISTRATION.—PROOF OF.

COURT OF QUEEN'S BENCH, Montreal, 6th June, 1865.

In Appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., MEREDITH, J., AYLWIN, J., MONDELET, A. J., DRUMMOND, J.

JAMES FOLEY, *Defendant in Court below,* Appellant, *and* ROBERT T. GODFREY, *Plaintiff in Court below,* Respondent.

Held: **That the certificate of registration of a deed is not insufficient because written on a separate paper from the deed.**

This was an hypothecary action brought by Respondent against Appellant founded upon a deed of sale from Respondent to David Wark, of the 13th October, 1860, before notaries, alleged to have been duly registered, and upon a deed of sale from Wark to Appellant, of one undivided half of the lot of land in question. Judgment was rendered *ex parte* in the Superior Court, in favor of Plaintiff. Montreal, 31st October, 1863, BERTHELOT, Justice.

ROBERTSON, Q. C., for Appellant, submitted: 1° That there was no sufficient evidence of the registration of the deed from Respondent to Wark, no certificate of registration appearing upon the deed. There was a certificate filed as a separate exhibit, which certificate was not an authentic instrument, nor did it say whether the deed to which it referred had been registered by memorial, or at full length. That to be authentic the certificate was required to be placed upon the instrument itself, more especially since Respondent himself as vendor was a party to the instrument: Con. Stat. of L. C., chap. 37, sec. 14, sub-sec. 3: " The said registrar shall mark " Registered by " memorial " on every such deed, conveyance, &c., or notarial " or office copy thereof and mention the day, hour and time, " &c." Sub-sec. 4: " All certificates *so given* shall be evidence " of such registries..." so also as to registrations at full length. Sec. 18: " The documents, instruments in writing, acts and " things mentioned in the first section of this act,.... may be " registered at full length by transcribing the same into the " proper books,.... and the certificate of the registrar, *on any* " *such document,* instrument in writing, act or thing regis- " tered at full length, shall be evidence of such registration..." See also sec. 20. So in Upper Canada, it was enacted that the registrar on production of the instrument and of the memorial and affidavit, should enter the memorial in a register book, and should file the memorial and affidavit: " And immediately " after such entry shall endorse a certificate *on every such*

" *instrument,* and shall sign the said certificate when so in- " indorsed, which certificate shall be taken and allowed as " evidence of such respective registries in all courts of record, " and in all other courts in Upper Canada." (1) In Scotland, " under these Statutes the requisites of registration include three particulars, &c., &c. 3. The certificate on the back of the *saisine* containing also reference to the pages of the record where the *saisine* is to be fuond." (2) In France : " Le conservateur fait mention, sur son régistre, du contenu aux bordereaux, et remet au requérant, tant le titre ou expédition du titre, que l'un des borderaux *au pied duquel* il certifie avoir fait l'inscription." (3) The interrogatories *sur faits et articles* were taken *pro confessis,* although not so framed as to admit of this being done. The form usually adopted, is to ask a party, is it not true that certain facts occurred in such and such a way, as in the case of an articulation of facts. In such case, an affirmative answer can be easily supplied in the event of a failure to answer, or of insufficient or evasive answers. In the present instance, this has not been done. The questions are: Are you the Defendant ? Are you the James Foley mentioned in the deed ? Were you not *détenteur ?*

DUVAL, Chief-Justice : The first question raised is as to whether the registrar's certificate filed is sufficient to prove the registration of the deed of sale from respondent to the *auteur* of Defendant, the certificate being on a separate paper and not upon the deed itself, as it is contended by Appellant it ought to have been. The court does not hold it absolutely necessary that the certificate should be indorsed on the instrument itself. If it is on another paper, it must shew the identity of the instrument, and this we think has been sufficiently done in the present case. (4) Another point was raised as to the form of the interrogatories, but we find the form is sufficient. Judgment confirmed. (15 *D. T. B. C.*, p. 482 ; 9 *J.*, p. 154 ; 1 *L. C. L. J.* p. 34.

ROBERTSON, A. and W., for Appellant.

BEDWELL, for Respondent.

(1) Con. Stat. U. C., chap. 89, sec. 30.

(2) 1 Bell's Com., p. 677.

(3) Code Civil, Nos. 2148, 2150.

(4) Bureau d'enregistrement du Comté de St-Hyacinthe. Je certifie que le 14 novembre 1860, à neuf heures et cinq minutes, A. M., a été enregistré à ce bureau, au registre B, vol. 18 et fol. 64, 65 et 66, sous le numéro 12,503 un acte de vente consenti devant MM. J. Smith, notaire, à Montréal, et confrère, en date du treizé octobre, mil huit cent soixante, par Robert Tounsend Godfrey, écuier, médecin, à Montréal, à David Wark, commis du même lieu, du lot numéro dix-huit, dans le second rang du township d'Acton, comté de Bagot, pour douze cents dollars, dont trois cents dollars payés comptant, balance payable dans deux ans, avec intérêt. Signé. H. St- Germain, Régistrateur, St-Hyacinthe, ce premier d'aout mil huit cent soixante-trois.

CHEMINS D'HIVER.

CIRCUIT COURT, Montreal, 30th March, 1864.

Before LORANGER, Justice.

LAVOIE, Plaintiff, *vs.* HOTTE *et al.*, Defendants.

Jugé : 1° Qu'en vertu de " l'Acte Municipal Refondu du Bas-Canada," un chemin d'hiver avait été valablement tracé et fait sur les terrains du Demandeur sans son consentement, sa clôture, qui était de pierre sans mortier, étant réputée être une clôture qui pouvait " être abattue ou replacée sans beaucoup de difficultés ou de grandes dépenses." (1)

2° Qu'une action en dommages contre l'Inspecteur pour avoir tracé ce chemin, et contre un autre pour avoir assisté au déplacement de la clôture doit, par conséquent, être renvoyée,

This was an action brought against Defendants to recover damages caused by their having traced a winter road over Plaintiff's farm in St. Martin, and removed his fences. The Defendants pleaded that one of the Defendants, Hotte, was Inspector of roads for the municipality of St. Martin, and acted under his directions, and that the winter road was laid out across Plaintiff's lands, in the place where it was ordinarily traced, and that Plaintiff's fences could, without great difficulty and expense, be removed and replaced.

LORANGER, Justice : Referred to the section of the law under which winter roads were laid out, Consol. Stat. of Lower Canada, ch. 24, sect. 42, sub-sects. 2 and 3. " 2. Winter roads " shall be laid out in such places as the Inspectors shall from " time to time determine. 3. They may be laid out, and carried through any field, or any inclosed ground, except such " as are used as orchards, gardens or yards or are fenced with " quick hedges, or with fences which cannot without great " difficulty or expense be removed or replaced, though which " they shall not be carried, without the consent of the occupant." The evidence shewed that Plaintiff's fences could be, and that they were removed, without much difficulty or expense. The fence was a wall of rough stones laid up without mortar. It had been said that, in a case decided by another Judge, it was held that the road could not legally be traced or made across the same fence. (2) He could

(1) V. art. 840 C. M.

(2) Dans la cause de *Lavoie* vs. *Gravel*, L poursuivait G, parce que ce dernier avait tracé, sans son consentement, un chemin d'hiver sur l'une de ses terres et qu'il avait percé deux travers de clôture de pierres sur cette propriété que L prétendait ne pouvoir être replacés sans difficultés. G plaida qu'il était l'entrepreneur de ce chemin ; qu'il avait été dûment nommé par l'inspecteur de la municipalité et qu'en cette qualité il avait le droit de percer les clôtures faites de pierres brutes et faciles à être replacées. JUGÉ : que, preuve suffi-

only decide from the evidence as given in the case before him, but it did not appear that, in the former case, Defendant was Inspector of roads, which was a point of importance. Here, Hotte was the servant of the municipality, acting in virtue of orders given him, and the other Defendant was legally carrying out the instructions of the officer. The action must therefore be dismissed. (14 *D. T. B. C.*, p. 441.)

GIROUARD, for Plaintiff.

CARTIER, POMINVILLE and BETOURNAY, for Defendants.

VENTE DE TERRE.

CIRCUIT COURT, Montreal, 30th March, 1864.

Before LORANGER, Justice.

GAUTHIER, Plaintiff, *vs.* GRATTON, Defendant.

Jugé: Que, dans le cas d'un Défendeur poursuivi pour le prix de vente d'une terre située dans le district où l'action a été commencée, et la signification faite au Défendeur dans un autre district, où il avait son domicile, et dans lequel l'acte de vente avait été exécuté, la Cour n'a pas juridiction, la cause d'action ayant originé dans un autre district. (1)

This was an action against Defendant, described as of the parish of Ste Thérèse, in the district of Terrebonne to recover portion of a *prix de vente* of a piece of land sold under a notarial deed of sale passed at Ste Thérèse on the 12 April, 1860, by one Leblanc, by whom the monies were transferred to Plaintiff. The Defendant pleaded, by declinatory exception, that he could not be sued by process served at his domicile, from the Circuit Court in the district of Montreal, but should have been sued in the Circuit Court at Terrebonne, on the well known principle *actor sequitur forum rei.* The Plaintiff answered that the land sold lay within the district of Montreal, and that, therefore, the suit was properly commenced.

LORANGER, Justice: Held the exception to be well founded. The cause of action arose from the sale; the deed was passed in the district of Terrebonne within which the Defendant resided. The attempt made in the cause to prove that the negociations for the sale, and the sale itself, took place within

sante étant faite que les deux travers de pierres ne pouvaient être replacés comme auparavant, le Défendeur, sous les dispositions du § 3 de la sec. 42 du ch. 24 de l'Acte des Municipalités, était en faute d'avoir défait cette clôture de pierres, sans avoir au préalable obtenu le consentement du Demandeur, ainsi que l'inspecteur lui avait donné instruction, et était responsable des dommages qui avaient pu en résulter. (Cour de Circuit, Montréal, 19 février 1862, BERTHELOT, J., 10 *R. J. R. Q.*, p. 206.)

(1) V. art. 34 C. P. C.

the district of Montreal had failed; nor could parol evidence to prove such facts be allowed. It could not be said that the whole cause of action had arisen within the district of Montreal, and the Defendant must therefore have *congé* of the demand.

JUDGMENT: "Considérant que, lors de l'assignation, le Défendeur était, comme il est encore, domicilié en la paroisse de Ste Thérèse de Blainville, dans le district de Terrebonne, où il a été assigné; que la cause d'action, qui est la vente consentie par Julien Leblanc au Défendeur, en la paroisse susdite, est née dans le district de Terrebonne, et que l'exploit d'assignation et les libelles de la demande n'offrent aucune des conditions voulues par la loi, et dont le Demandeur a justifié, pour donner juridiction au tribunal sur le présent litige, maintient l'exception déclinatoire produite par le Défendeur, déclare que le Défendeur était mal assigné, et lui donne congé de la demande et exploit d'assignation." (14 *D. T. B. C.*, p. 442.)

MOREAU, OUIMET and CHAPLEAU, for Plaintiff.

BELLE, for Defendant.

CORPORATION MUNICIPALE.

COUR DE CIRCUIT, Québec, 24 mars 1864.

Présent : TASCHEREAU, juge.

RHÉAUME, Appelant, *et* LA CORPORATION DU COMTÉ DE LOTBINIÈRE, Intimée.

Jugé : 1° Que le conseil municipal d'un comté et la corporation de ce même comté sont une seule et même personne.

2° Que, dans l'espèce, les délais dans lesquels la signification du cautionnement et de la requête doit être faite ne sont pas à peine de nullité.

Cette cause était un appel à la Cour de Circuit, d'une décision d'un conseil de comté, homologuant un procès-verbal, relatif à un chemin et pont, et institué sous l'empire de la sec. 67 ch. 24 du stat. ref. du Bas-Canada. (1) Par les sous-sections 5 et 8 de la section suscitée, il est réglé que l'Appelant devra signifier copies du cautionnement et de la requête en appel, sous quinze jours du jugement, au juge qui aura prononcé le jugement, et sous vingt jours à la partie Intimée. L'Appelant ne s'étant pas conformé à cette exigence de la loi, et n'ayant fait faire, dix-neuf jours après le jugement, qu'une seule signification au secrétaire-trésorier du conseil municipal

(1) *Vide* 24 Vict., ch. 30.

du comté de Lotbinière, l'Intimée fit motion que l'appel fût débouté pour insuffisance de signification.

BOSSÉ, J. G., pour l'Intimée : L'Intimée est la Corporation du comté de Lotbinière, et le tribunal qui a prononcé le jugement dont est appel est le Conseil Municipal du même comté. Ce sont deux personnes morales bien distinctes en loi ; l'une est la Corporation, le corps politique, incorporé, représentant le comté ; l'autre, le juge ou pouvoir exécutif de la Corporation. Les deux sections du statut pouvaient et devaient donc être suivies, puisque les deux significations voulues pouvaient se faire sur deux différentes personnes ; or, une seule signification a été faite, dix-neuf jours après le jugement, au secrétaire trésorier du conseil, ce qui ne peut valoir, comme signification sur l'Intimée, qui ne peut être assignée par le secrétaire trésorier du conseil, et ne peut valoir non plus comme signification au juge, puisqu'elle est faite après les délais voulus. D'ailleurs, de deux choses l'une, ou bien le Conseil de comté et la Corporation sont deux personnes distinctes, et, alors, il aurait fallu deux significations, ou bien elles sont une seule et même personne, et alors la même personne se trouverait à la fois juge et Intimé, ce qui est impossible. Le statut a donné un appel sous les conditions qu'il indique, et à ces conditions seules ; et si l'Appelant ne s'y est pas conformé, son appel doit être débouté.

GLEASON, pour l'Appelant : J'admets que la signification faite au Juge n'a pas été faite dans les délais voulus, mais le Conseil et la Corporation du comté sont une seule personne. C'est là ce qui arrive le plus souvent, et c'est là ce que la loi a dû avoir eu en vue. L'on permet ordinairement d'amender les défauts qui peuvent se rencontrer dans les appels, et l'irrégularité dont on se plaint n'est pas une de celles qui doive faire priver une partie de son recours devant un tribunal Supérieur.

TASCHEREAU, Juge : La motion doit être renvoyée. 1o. Parce que le Conseil Municipal d'un comté, et la Corporation de ce même comté sont une seule et même personne. 2o. Parce que les clauses du Statut qui prescrivent le temps dans lequel les significations des cautionnement et requête doivent être faites, ne sont pas à peine de nullité, et que les délais n'y sont pas fixés d'une manière absolue. 3o. Parce que les règles d'interprétation veulent que l'on applique plutôt l'esprit que la lettre de la loi. Motion renvoyée. (14 *D. T. B. C.*, p. 444.)

FOURNIER et GLEASON, pour l'Appelant.

BOSSÉ et BOSSÉ, pour l'Intimée.

SAISIE-ARRET AVANT JUGEMENT.—EXCEPTION A LA FORME.

SUPERIOR COURT, Montréal, 30 mars 1864.

Before BERTHELOT, Justice.

GIROUX, Plaintiff, *vs.* GAREAU, Defendant.

Jugé : Qu'un affidavit pour un writ de saisie-arrêt before judgment, et le writ même, peu[illegible]tre attaqués par une exception à la forme. (1)

The case was commenced by a writ of *saisie-arrêt* before judgment, and Defendant filed an *exception à la forme* "to the writ and affidavit," on the ground that Defendant was not a trader; that Plaintiff had failed to set forth that after the alleged refusal to settle with Plaintiff, he Defendant had continued to carry on trade, denying the alleged secretion of effects, and the intention to defraud, and all the allegations of the affidavit; conclusion that the affidavit be declared insufficient and irregular, and that the writ and attachment under it be set aside. The exception was met by an answer in law on the ground that the allegations were not matters of *exception à la forme*, or of any preliminary exception, and were wholly unfounded in law.

BERTHELOT, Justice : Stated that the judgment of the Court of Appeal[illegible] the case of *Molson's Bank* and *Leslie*, (2) had settled the [illegible] raised in the cause; and that an affidavit for *saisie-arrêt* might be attacked by an *exception à la forme.* The jurisprudence, as settled by that case, had been followed by the other Judges of the Court, and he would not give a judgment adverse to the decision in appeal at the same time, he did not decide that the affidavit could not be attacked by another form of plea. Judgment dismissing answer in law. (14 *D. T. B. C.*, p. 447 et 8 *J.*, p. 164.)

JOHNSON and PICHÉ, for Plaintiff.

MOREAU and OUIMET, for Defendant.

(1) V art. 819 et 854 C. P. C.

(2) 12 R. J. R. Q., p. 286 et 11 R. J. R. Q., p. 77.

PROCEDURE.—ENQUETE.

SUPERIOR COURT, Montréal, 1er avril 1864.

Before SMITH, Justice.

BEAUDRY, Plaintiff, *vs.* OUIMET *et al.*, Defendants.

Jugé : Que la Cour, pour cause suffisante, rayera une cause du rôle de droit pour être entendue aux mérites, et permettra que l'enquête soit rouverte pour l'examen d'un témoin, et permettra aussi au Demandeur de produire sa déclaration qu'il entend se servir de la déposition du Défendeur, nonobstant qu'une déclaration à cet effet, faite antérieurement, eût été rejetée du record, sur motion du Défendeur, comme irrégulièrement produite. (1)

SMITH, Justice : In this case Plaintiff has moved that the case be struck from the roll for hearing on the merits, and that the *enquête* of Plaintiff be reopened for the examination of a witness; and also to be allowed to file a declaration that the intends to make use of the deposition of Defendants as witnesses, which declaration had been rejected by a judgment rendered in december, 1863, (2) as irregularly filed. The cause shewn for the examination of the witness, in the affidavit filed, is sufficient. Although the declaration previously made has been rejected as irregularly filed after *enquête* closed, I am disposed to permit the declaration to be filed of record on the reopening of the *enquête*. The court has a discretion in a case like this for the furtherance of Justice, and it may even be said that, although the statute has fixed a delay within which a party must declare whether he avails himself of the deposition of an adverse party, yet the common law gives to a suitor the right to submit the cause to the oath of his adversary, the permission now given only assists to forward the substantial rights of the parties. (14 *D. T. B. C.*, p. 449.)

ROY, for Plaintiff.

MOREAU, for Defendants.

(1) V. art. 251 C. P. C.

(2) *Vide* 12 *R. J. R. Q.*, p. 289.

CORPORATION MUNICIPALE.—TAXES.

COUR SUPÉRIEURE, Québec, 5 septembre 1864.

Présent : TASCHEREAU, Juge.

BOSWELL, Appelant, *et* LE MAIRE, LES CONSEILLERS ET LES CITOYENS DE LA CITÉ DE QUÉBEC, Intimés.

Jugé : 1° Que la Cour Supérieure a juridiction, comme Cour d'Appel, des jugements de la Cour du Recorder, relativement aux taxes imposées par la Corporation de la Cité de Québec, en vertu de ses règlements.

2° Que lorsqu'une personne, possèdant une propriété destinée à un objet spécial, tel qu'une brasserie, a été taxée à plus que la valeur actuelle de sa propriété, en conséquence de la valeur additionelle qu'elle acquiert par le négoce que l'on y fait, elle ne peut être taxée en sus sur le revenu annuel de tel négoce.

L'Appelant se plaignait des cotisations municipales de Québec sur sa propriété, comprenant des bâtisses dont il se servait comme brasserie, alléguant : " That the aggregate value of " nine thousand pounds had been placed upon his real estate " in St. Valier street, by the assesment books for the year " 1862 ; that the said real estate consisted of a brewery, and " that the machinery and appointments thereof give the same " its value, and without them, the said real estate would only " be worth about £5,000, and would not have a yearly rental " of more than £250 ; that he has also been assessed at the " sum of seventy-five pounds for special tax on brewers, the " said tax being based on the yearly valuation of five hundred " pounds as assessed in the said assessment book ; that were the " yearly valuation reduced to the sum of two hundred and fifty " pounds as it should be, the said special tax should also have " a proportional reduction." Sur cette plainte qui avait été portée devant la Cour du Recorder de cette cité, jugement fut rendu, déboutant le Plaignant, et c'est de ce jugement que l'appel a été institué.

TASCHEREAU, Juge : Il s'agit d'un appel de la décision rendue par le Recorder de la cité de Québec, déboutant la plainte portée par Boswell contre les retours de cotisations apparaissant contre lui aux livres de cotisations de cette cité. Il s'élève trois questions : La 1ère est celle de savoir si cette Cour, ou la Cour du Banc de la Reine, a juridiction comme Cour d'Appel de la décision du Recorder. La 2nde. Si les cotisations portées dans les livres de la Corporation de la cité de Québec, contre l'Appelant, Boswell, sont exagérées sous le rapport du montant. La 3ème. Si la Corporation de Québec avait le droit d'imposer ces cotisations. La 1ère de ces questions est soulevée par les Intimés, savoir : La Corporation de la cité de Québec, qui nie à ce tribunal la juridiction d'appel en semblable matière. En

référant au Statut 19 et 20 Victoria, chap. 106, on voit que ce statut établit la Cour du Recorder en la cité de Québec. On voit par le 22 Victoria, chap. 30, sect. 11, que cette Cour du Recorder a jurisdiction exclusive en revision des plaintes relatives au cotisations en la cité de Québec et qu'un Juge de la Cour Supérieure, en terme ou en vacance, est le tribunal d'appel des décisions du Recorder. Mais, d'un autre côté, l'on voit que, quoique par le Statut 24 Vict., chap. 26, qui amende et consolide les lois relatives à la Cour du Recorder, et définit ses pouvoirs, il ne soit pas donné à la Cour du Recorder juridiction sur les plaintes en revision de ses cotisations, que lui confère le Stat. 22 Vict., chap. 30, sect. 11, néanmoins, conformément à la sect. 15 de cet acte, c'est devant la Cour du Banc de la Reine que l'on doit porter appel des décisions du Recorder de Québec. Il est vrai que le Stat. 24 Vict., chap. 26, amende et consolide les lois relatives à la Cour du Recorder, et définit ses pouvoirs, mais on remarque que ses pouvoirs ainsi définis, ne sont que ceux de sa juridiction originaire (original jurisdiction) lesquels consistent à décider " toute action portée par la Corporation de Québec pour le recouvrement de taxes et loyers dûs à la Corporation ; taxes des marchés, de l'aqueduc, coût de l'introduction de l'eau en aucune maison, taxes payables par le propriétaire, le locataire, toute offense contre la police, et le recouvrement de certaines amendes, par suite d'infraction aux lois et règlements de la dite Corporation." Mais cette loi n'enlève pas spécifiquement au Recorder la juridiction que lui donne le 22 Vict., chap. 30, sur les plaintes en réformation de cotisations ; de fait, cette dernière loi ne fait aucune mention du droit de révision des cotisations. Il aurait fallu une législation spéciale pour enlever au Recorder une jurisdiction exclusive que lui donne un statut particulier, et il ne suffit pas de dire que par implication une juridiction ou un pouvoir ait été enlevé par un autre statut ; selon ce raisonnement le Statut 22 Vict., chap. 30, n'est nullement affecté ni modifié par le Stat. 24 Vict., chap. 26, elle est en toute sa force, et notamment en ce qui concerne la revision des cotisations. Maintenant, quant au droit d'appel qui, par la 24me Vict., est conféré, des décisions du Recorder, à la Cour du Banc de la Reine, on voit que ce droit n'est donné que pour les cas spécifiquemment énumérés dans le Stat. 24 Vict., chap. 26, sect. 15, et qui sont ceux dont il est parlé plus haut. Nulle mention n'est faite dans ce statut de la revision des cotisations, ni du droit d'appel des décisions du Recorder, à un Juge de la Cour Supérieure, et il est à conclure que la législature n'a pas voulu affecter par le Stat. 24 Vict., chap. 26, les pouvoirs qu'elle avait conférés au Recorder et aux Juges de la Cour Supérieure en vertu de la 22 Vict., chap. 30, sect. 11.

Si l'on décidait que le Stat. 24 Vict., chap. 26, exprime tous et chacun les pouvoirs de la Cour du Recorder, il n'y aurait pas d'autorité légalement et spécialement chargée de reviser les cotisations; or la loi n'a pu avoir en contemplation une telle idée, de laisser à un cotiseur le droit d'évaluer, et à une Corporation, le droit de cotiser qui que ce soit, sans fournir à cette personne le droit d'appeler de cette cotisation, ou de la faire reviser, ce qui serait le cas, si le Stat. 24 Vict., chap. 26, rappelait le Stat. 22 Vict., chap. 30. Ce premier point décidé, il devient évident, comme il est dit plus haut, par la simple application de la sect. 15 du Stat. 24 Vict., chap. 26, que la Cour du Banc de la Reine n'est instituée tribunal d'appel des décisions du Recorder, que dans les matières spécialement énumérées en cet acte, et que la juridiction de cette Cour (celle de la Cour Supérieure) quant à l'appel de la décision du Recorder, relative aux plaintes contre les cotisations n'est nullement affectée et reste en pleine force. La 2nde question, qui est celle de savoir si le montant de la cotisation est exagéré ou non, ne souffre pas de difficulté sous le point de vue du quantum. La preuve faite devant la Cour du Recorder, ne donne pas à la brasserie de Boswell une valeur exagérée, si l'on inclut dans la valeur de la propriété celle du mécanisme nécessaire pour faire fonctionner une brasserie; mécanisme tenant à fer et à cloux, tellement indispensable, que sans ce mécanisme la brasserie ne serait plus une bâtisse où l'on fabriquerait la bière ou autre liqueur, et tomberait dans la catégorie des propriétés sans nom, sans but et sans utilité spéciale. Les cotiseurs ont donc bien fait de cotiser la propriété de la brasserie en y comprenant la valeur du mécanisme; on a voulu faire une distinction entre le métier de *malting* et de *brewing* qui s'exerçait dans le même édifice, comme distinct et séparé, mais on perd de vue que le *malting* est le procédé de préparation au *brewing*, et que le tout se confond dans l'occupation principale, qui est le *brewing*. Mais s'élève sous la 3ème question, le point décisif en la cause. La Corporation a-t-elle le droit d'imposer une taxe sur la brasserie, comme brasserie, et en même temps imposer une taxe sur le brasseur, en raison directe de la cotisation qu'il paie pour sa brasserie, ou le lieu où il exerce son industrie? En un mot, cette dernière taxe, ne serait-elle pas la répétition de la première, sous un autre nom, au lieu d'être uniforme pour tous les brasseurs, savoir, d'un prix fixe, déterminé, comme nous en donne l'idée du mot *tax*, *duty*? Je crois que la législature, en donnant à la Corporation le droit de taxer les propriétés et les personnes, n'a point voulu lui donner le droit de taxer deux fois une propriété, mais seulement une seule fois, à raison de sa valeur annuelle, et que, quant au métier de la personne, la législature a voulu

qu'il pût être taxé, non pas en raison de son profit, de sa valeur, de son rapport, eu égard à la valeur plus ou moins grande du local où s'exerce ce métier, mais qu'il fût taxé comme métier, d'une manière uniforme pour tous ceux qui exercent ce métier, sans savoir si ce métier s'exerce dans une propriété de £10,000 ou de £500. Car, en réalité, c'est taxer deux fois le brasseur pour la même chose, que de lui imposer, comme la Corporation l'a fait à l'égard de Boswell, d'abord une taxe de $150 sur sa brasserie, estimée à $500 par année, et ensuite de lui imposer une taxe de $300, comme taxe des brasseurs, sur le principe que Boswell, d'après le règlement de la Corporation de Québec, doit payer comme brasseur une taxe de 15 pour cent sur la valeur annuelle de la brasserie. Le règlement de la Corporation de Québec, du 25 août 1859, en ce qui concerne la taxe que la Législature lui permettait d'imposer, par l'acte 18 Vct., chap. 159, sec. 51, sous-sec. 2, aux brasseurs, comme métier, est illégal et non conforme à l'esprit de la loi; car ce règlement dit, par les articles Nos. 1 et 2, qu'il sera imposé un chelin et demi de taxe sur le revenu annuel de toute propriété, ce qui renferme une brasserie ou toute autre fabrique; et ensuite ce règlement, par la sec. 28, impose une taxe de 15 par cent sur le revenu annuel de chaque brasserie, ce qui, dans mon opinion, est contraire aux pouvoirs de la Corporation qui ne peut imposer aux brasseurs qu'une taxe fixe, uniforme, comme métier, et non proportionnée aux revenus du local où s'exerce ce métier. Pour ces raisons, je crois devoir dire que la taxe de $150, imposée sur la brasserie, comme propriété, a été légalement imposée, mais qu'en raison de l'illégalité du règlement au dit article 28, la Corporation de Québec ne peut recouvrer de Boswell la taxe de $300, imposée sur lui, comme brasseur, calculée sur le revenu annuel de sa brasserie: en conséquence, le jugement du Recorder est modifié, en ce que l'item de $300, chargé contre l'Appelant, est retranché, et il est ordonné que ce montant soit retranché du livre de cotisations, avec dépens contre la Corporation. " La Cour, considérant que cette Cour a juridiction pour connaître de l'appel susdit, et considérant que telle juridiction, comme Cour d'Appel en pareille matière, n'a pas été enlevée par l'acte ou statut provincial passé en l'année vingt-quatrième du règne de Sa Majesté, chapitre vingt-six, et que l'appel accordé par le dit statut à la Cour du Banc de la Reine, n'est que de la décision de certaines causes civiles ou infractions des lois et règlements de police énumérées au dit acte, et que le statut passé en la vingt-deuxième année de Sa Majesté, chapitre 30, section 11, n'est nullement rappelé par le dit statut 24 Victoria, chapitre 26, ou aucun autre statut: Considérant qu'il n'y a pas eu exagération dans l'évaluation

de la brasserie du dit Joseph Knight Boswell, ni dans l'estimation de sa valeur annuelle, et que la Corporation de Québec était légalement revêtue du pouvoir d'imposer la taxe ou cotisation apparaissant sous le No. 1, dans l'état ou extrait des livres de cotisations de la dite Corporation de Québec, au montant de cent cinquante piastres, et qu'il était permis aux cotiseurs de faire entrer dans l'estimation de la propriété de la brasserie, et dans la cotisation d'icelle, la valeur du mécanisme d'icelle brasserie : Considérant que la Corporation de Québec, n'avait pas, par la loi, lors du vingt-cingt août 1859, le pouvoir de taxer deux fois le même immeuble pour le même objet, mais pouvait taxer une seule fois la brasserie de Boswell, et le taxer lui-même comme exerçant un métier, savoir : celui de brasseur : Considérant que la cotisation de trois cent piastres, que les Intimés réclament contre l'Appelant a été imposée contre l'Appelant, par suite de la section 28 du règlement de la dite Corporation, fait et passé le vingt-cinq avril 1859 : Considérant que la dite section du règlement impose contre les brasseurs une taxe de quinze louis, pour chaque cent louis de la valeur annuelle cotisée da la brasserie de tel brasseur, et que ce moyen de taxer n'est pas uniforme, et n'est pas conforme aux exigences de la loi ; la Cour déclare la section 28, du susdit règlement, illégale, et ordonne que la somme de trois cent piastres imposée et chargée contre Boswell comme brasseur, et apparaissant dans le livre de cotisation de la dite Corporation, contre Boswell, soit retranchée des livres de cotisation. (14 *D. T. B. C.*, p. 450.)

CAMPBELL et GIBSONE, pour l'Appelant.

BAILLARGÉ, L. G., pour les Intimés.

CERTIORARI.—APPEL.

BANC DE LA REINE, EN APPEL, Montréal, 6 Septembre, 1864.

Présents : DUVAL, Juge-en-Chef, MEREDITH, MONDELET, DRUMMOND et BADGLEY, Judges.

BOSTON *et al.*, Appelants, *et* LELIÈVRE *et al.*, Intimés.

Jugé : Qu'un jugement de la Cour Supérieure sur un writ de *Certiorari* est un jugement final et en dernier ressort ; et que, dans l'espèce, il n'y a pas appel de tel jugement à la Cour du Banc de la Reine, telle que constituée dans le Bas-Canada.

Appel d'un jugement de la Cour Supérieure, (MONK, Juge) rendu le 27 juin, 1862, annulant un bref de *certiorari* émané de la même Cour, le 4 décembre, 1861, à la requête de Boston, en son vivant, seigneur des seigneuries Thwaite et St. James,

pour la revision de la décision finale rendue le 29 mai, 1861, par Lelièvre, Dumas et Delagrave, Commissaires Reviseurs sous l'autorité de l'acte seigneurial, la dite décision finale confirmant un jugement de Henry Judah, commissaire sous l'autorité du même acte, dont Boston avait appelé devant eux. Le 2 mars, 1863, les Intimés présentèrent une motion pour faire rejeter le bref d'appel en cette cause ; 1o. " Parce que le jugement rendu en la dite cause ou instance par la Cour Supérieure siégeant en la dite Cité de Montréal, le 27 juin, 1862, et dont se plaignent les Appelants, est un jugement final et en dernier ressort " ; 2o. Parce que, par et en vertu d'un Acte (1) du Parlement de cette Province, il est déclaré qu'il n'y aura aucun appel de tel jugement." (2) Le 5 septembre, 1863, la même motion fut renouvelée de la part de l'honorable A. A. Dorion, alors procureur-général pour le Bas-Canada, le jugement sur cette motion est comme suit : " The Court, considering that, in and by the judgment and decision of Henry Judah, one of the commissioners under the Seigniorial Act, in the matter of the Fiefs of Thwaite and St. James, dated the sixteenth April, 1857, and complained of by petitioners, there does not appear to be or to have been any excess of authority or jurisdiction exercised by Judah: Considering that, by his petition in appeal from the judgment and decision of Judah, in due course of law, to the revising commissioners Siméon Lelièvre, Norbert Dumas and Cyrille Delagrave, petitioner did in effect recognize the jurisdiction and authority of Judah, and of the revising commissioners to adjudicate and decide upon all and every the claims, pretensions and rights of petitioner, in the matter of the Fiefs and seigniories of Thwaite and St. James: Considering that, in the final judgments and decisions of the revising commissioners, Lelièvre, Dumas and Delagrave, made and rendered in the matter of Fiefs ang seigniories of Thwaite and St. James, on the twenty ninth day of May, 1861, confirming the judgment and deci-

(1) Stat. Ref. B.-C., cap. 88, sec. 17 ; Ibid., cap. 41, secs. 19 et suiv ; Ibid., cap. 89, sec. 6.

(2) Certaines procédures des commissaires pour la construction et réparation des églises, etc., relatives à la construction d'une église en la paroisse de Saint-François-du-Lac, avaient été transmsies à la Cour du Banc du Roi au moyen d'un bref de *certiorari*. Le jugement de la Cour du Banc du Roi confirma les procédures des commissaires. Sur Appel, les Appellants s'efforcèrent de soumettre ce jugement, ainsi que les procédures des commissaires, à la revision de la Cour d'Appel. Les Intimés firent motion que le bref d'appel fût déclaré nul et l'appel mis au néant, sur le principe que la Cour d'Appel n'avait pas juridiction pour reviser un jugement rendu dans la cour inférieure sur *certiorari*. La cour, déclarant cette prétention fondée, rejeta l'appel. (*Bazin et al.* et *Crevier et al.*, et *Henry et al.*, commissaires, etc., Cour d'Appel, Bas-Canada, avril 1843, STUART, J. en C., BOWEN, J., STEWART, J., L. PANET, J., P. PANET, J., et BÉDARD, J., 3 *Revue de Leg.*, p. 401.)

sion of Judah, of the sixteenth April, 1857, and of which final judgments and decisions petitioner has also complained, there does not appear to be or to have been exercised any excess of authority or jurisdiction by the revising commissioners, notwithstanding that some of the claims for indemnity made by petitioner which were rejected by Judah, and the revising commissioners, as illegal, appear to be well founded in law, and that petitioner ought to have been admitted to proof in respect thereof: Considering that none of the aforesaid judgments and decisions can in law be impeached, questioned, invalidated or quashed by proceedings under and in virtue of a writ of *certiorari* in the manner and form sought by petitioner, doth grant and declare absolute the said rule to quash and set aside the said writ of *certiorari*, with costs, and the proceedings and record in this matter are ordered to be remitted to the said revising commissioners.

Barnard, for Appellants: Besides the question whether the english law grants a writ of *error* in a case of *certiorari*, and the other question whether, under the statutes giving special powers to our Court of Appeals, an appeal lies here, if it does not in England, there is the further question whether this is strictly the case of an appeal on a *certiorari*. As to the law in England, no case is cited specially relating to *certiorari*. The only cases relate to peremptory *mandamus*. "As at common law, says Tapping, on *Mandamus*, " p. 397, a writ of *error* does not lie except upon a judgment, " or on an award in the nature of a judgment, the words of " the writ being, 'Si judicium *redditum sit*, &c.,' so it was at " an early period held not to lie to review the decision or " judgment of the Court of B. R. on the award of peremptory " *mandamus*, because there was no record on which error " could be brought, it being a mere award of the writ." The reason given in R. vs. Trinity, 8 Mod., 27, and 1 Strange, 526, is the omission in the judgment of the words, *ideo consideratum est*. If we suppose in existence a Court of Revision with the powers naturally incident to such a Court, such reasoning must be considered very unsatisfactory; for whatever the form adopted, there is a decision, involving perhaps the most important matter which can be conceived, and that decision, it might be a final one. It is possible the form of the proceedings worked in a manner which was not intended, the absence of record making an appeal impossible. The Court of B. R. issuing prerogative writs, was moreover for a long period absolutely the court of last resort; the Court of Exchequer, as first created, having been invested with the powers of a court a *error* only in cases expressly limited, (1) and the ju-

(1) 3 Stephen's Com., p. 419.

risdiction of the House of Lords being considered an usurpation, and constantly, if not always, openly resisted. (1) In two of the leading cases, (2) the Judges were inclined to think error would lie, if costs had been awarded by the Court below. The stats. 9 Ann, c. 20, 1st Wm. 4, c. 21, having permitted the joinder of issue on the return to a writ of *mandamus*, the objection founded on the absence of a formal judgment, and probably of a record, disappeared, and error was held to lie. In a more recent statute, 6 and 7 Vict., c. 67, the right to an appeal was specially recognized, even it is thought in cases of peremptory *mandamus*. But whatever progress the question seems to have made in England, a special reference to the last mentioned statute, and to the case of *R.* vs. *Manchester R.* 3 Q. B. R., p. 528, decided in 1842, previous to the passing of the stat. 6 and 7 Vict., c. 67, must produce the conviction that the question has not yet been considered in England in all its relation, and that much remains to be done before it is placed upon a logical basis. In the year 1842, the question received much attention in the United States, on the occasion of the celebrated Canadian case of Holmes, who asserted the principle, that Courts of revision of right have the revision of decisions rendered on prerogative writs. Such was in effect the view taken by Judge Story, Chief-Justice Taney, and two other Judges of the Supreme Court of the United States, and it was the means of saving Holmes life. (3) It is upon a consideration of all that can be said on the subject that Chief-Justice Redfield seems to have arrived at the very natural and reasonable conclusion that where the Court having jurisdiction to award the writ is not the Court of last resort, its judgments are revisable. (4) It must be obvious that to establish that error lies in the case of *mandamus*, is to establish that it lies in the case of all prerogative writs. By the writ of *certiorari*, the Court exercising the superintending jurisdiction controls the inferior jurisdictions, as it controls them by the writ of *mandamus*. The essence of both writs is the same only that in practice *mandamus* is used to set a jurisdiction in motion, and the *certiorari*, in general, to correct its judgments. But in practice the two writs are often merged, *certiorari* becoming *mandamus*, and *vice versa* ; *vide* an instance in Redfield, on Railways, p. 469. *Vide* also on the identity of nature of *certiorari* and *mandamus*, 3 Stephen's

(1) 2 Chitty's Practice, p. 585.

(2) *Dean* vs. *Dowgatt P. Wms.*, 348, and *Dean Dunblin* vs. *King*. I Bro., P. C., p. 73.

(3) The case is fully reported in 14 Peters, p. 540.

(4) Redfield, on Railways, p. 468.

Com., p. 405. (1) If the views above expressed be concurred in, it could not be considered strange that, while the proceedings in *error*, on *mandamus* and *habeas corpus* remained in such an unsatisfactory position, no proceedings in *error* should have been attempted in *certiorari*, with which are seldom connected matters of great importance. So much for the law in England. But whatever doubt, if any could exist there, none under the constitution of our Court of appeals can exist here. (2) The language used is immensurably stronger than that used in the statutes creating Courts of Error in England, or the United States; and moreover an appeal under the last mentioned section is given from *any* judgment in all cases where the matter in dispute exceeds £20 sterling; attention is particularly called to the observations of the judges already mentioned in the case of Holmes, on the question whether the word *suit* was sufficiently broad to cover a writ of prohibition. (3) With regard to the effect of sec. 16, cap. 88, Cons. Stat. L. C., it is not apprehended it could give rise to much difficulty. If Appellants have not the right of appeal *aliunde*, this statute does not give it to them. But if they have it, this statute does not take it away. (4) With regard to the last question, although the judgment has been rendered on the occasion of proceedings in a case of *certiorari*, the appeal from that judgment cannot strictly be said to be an appeal on a *certiorari*. The question raised on the appeal has nothing whatever to do with the right of the Superior Court to issue the writ, or with the expediency of issuing it, or with the illegality of the proceedings sought to be corrected. All these questions are settled. The writ has issued. The commissioners in compliance with its exigency, have returned their proceedings, and the Superior Court has declared they ought to be corrected. The object of this appeal is simply to establish that the Superior Court has the power to grant the redress which it declares ought to be granted; and that section 29 and the second paragraph of sec. 19 of cap. 41 of the Cons. Stat. of L. C. have not taken away the power to give redress. Upon this point Appellants have every confidence they will be able to convince this court, and they send herewith , a memorandum of the authorities upon which they rely. But certainly the objections taken in England cannot apply here, since there is a formal judgment drawn up in the ordinary form,

(1) 1 Tidd., 397 et seq. : Idem 2nd vol., pp. 1134 et seq. ; 2 Chitty, pp. 353 et seq. ; Idem, pp. 218 et seq., and p. 375.

(2) Cons. Stat. L. C., cap. 77, secs. 4, 5, 23.

(3) *Holmes* vs. *Jennisson*, 14 Peter's Rep., p. 566.

(4) Dwarris, p. 673.

and it carries costs, and there is moreover a record, since it has been transmitted and it is now before this court.

MONDELET, Juge : Je ne comprends pas comment il se pourrait faire qu'il y eût lieu à un appel à cette cour, d'un jugement rendu par la Cour Supérieure sur un *Certiorari*. La Cour Supérieure a, à l'égard des *writs* de prérogative, et de la surveillance inhérente à sa constitution, sur tous les tribunaux inférieurs, la même juridiction que la Cour du Banc de la Reine, en Angleterre, laquelle est une Cour de première instance. Il n'en est pas ainsi de la Cour du Banc de la Reine en Canada, dont le nom est une anomalie, qui n'eût pas existé si, comme à Madras, Bombay, Calcutta, Ceylan, Hong-Kong, à la Nouvelle-Zélande, dans la Terre de Van-Diemen, dans la Nouvelle-Galles du Sud, à la Jamaïque, dans les provinces du Nouveau-Brunswick, de la Nouvelle-Ecosse, de Terreneuve, dans toutes les Colonies Anglaises enfin, à l'exception de l'Isle de Jersey, où la Cour en dernier ressort, porte le nom de Cour Royale de l'Isle de Jersey, (Royal Court of the Island of Jersey,) et du Haut et du Bas-Canada, on eût appelé notre Cour du Banc de la Reine "Cour Suprême," en lui attribuant, en même temps, cela va sans dire, une jurisdiction appellative. En Canada, la Cour du Banc de la Reine, en matières civiles, n'a aucunement la surveillance des tribunaux inférieurs. Sa jurisdiction est appellative, voilà tout. Quant aux writs de prérogative, elle n'a d'autre jurisdiction, dans leur exercice, que relativement à l'*habeas corpus*. Si l'on prétendait que la Cour Supérieure, en s'occupant, comme elle l'a fait, de la matière qui lui était soumise, a excédé sa juridiction, la seule conclusion à en tirer, c'est que son jugement serait une nullité ; il n'y aurait pas de jugement et alors, il y aurait encore bien moins un droit d'appel à la Cour du Banc de la Reine en Canada. Je pense, donc, que l'Appelant doit être éconduit de cette Cour, avec dépens, c'est-à-dire, que la motion des Intimés pour faire mettre au néant le *writ* d'appel, doit être accordée, avec dépens.

BADGLEY, Justice : Under the seigniorial acts, schedules prepared by commissioners are subject to revision by a Court composed of three commissioners, excluding the schedule commissioners, the decision of any two of whom shall be final. (1) For this purpose of revision that *Court shall hear, try and determine* the matters alleged in the petition for revision (sec. 22) and *may award costs* (sec. 23). The place of the sittings for *the Court* are fixed by sec. 24. And this *Court of revision* is authotized to decide, of itself, points not settled by the special seigniorial Court. (sec. 25). The commissioners

(1) Cons. Stat. L. C., cap. 41, sec. 19, sub-secs. 1, 2, 3, pp. 409, 410.

thus acting in revision are therefore constituted a court, having the attributes thereof as above. By Con. Stat. L. C., cap. 78, sec. 4, the Superior Court for Lower Canada has the power following: "Excepting the Court of Queen's Bench, all courts and magistrates, and all other persons, and bodies politic and corporate within Lower Canada, shall be subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof, in such sort, manner and form as by law provided;" and the Superior Court is substituted in effect for the Court of Queen's Bench abolished by the 12 Vict., c. 38, and endowed with all its superintending and reforming power. The attributes of the Superior Court are therefore in this respect extremely general and very large over all inferior Courts, but mention is not made or specified of its particular constituents or of its mode of application of its superintending power and differing from the more limited power of this character conferred upon the Circuit Court by ch. 79, sec. 3, sub-sec. 2, which gives to the latter a concurrence of jurisdiction with the former for the issuing of writs of *certiorari* relative to proceedings had before Justices of the peace and Commissioners of small causes. In the Circuit Court, therefore, the superintending jurisdiction is specified and limited, and the mode of operating it by *certiorari* is settled. Now the seigniorial statutes provide that the judgment of revision shall be final; but this provision of finality does not take away or control the superintending power of the Superior Court, and beside this, speaking for myself as to the extent of finality, I consider it a restricted one, because, taken in connection with the peculiar and exceptional jurisdiction attributed to the commissioners, the finality appears to me to be personal as regards them and their action. But be that as it may, that Court is unquestionably subject to the superintending power of the Superior Court. The question remains, how that power of the Superior Court is to be applied in this case. The question is solved by the parties themselves by the issue of a writ of *certiorari*; and the right to use that writ appears to me to be entirely undeniable, because it is a beneficial writ for the subject, and in general cannot be taken away without express words in the statute. The seigniorial statute contains no such words, and hence the writ of *certiorari* issued herein, and which is a legitimate means of enforcing the reforming power of the Superior Court over inferior jurisdictions, was well issued. (1) In principle, *certiorari* lies to all Courts where the Superior tribunal can administer the same justice as the Court below, and also, though the cause

(1) 1 Bl. R., 231; 2 Burr., 1040; 5 Petersdorf, 153.

cannot be determined in the higher tribunal, yet this writ may be granted if the inferior tribunal have no jurisdiction over the matter, or do not proceed therein according to the provisions of law; hence, though the jurisdiction of the Superior Court is not taken away except as above, its power is limited to *judicial proceedings*, and therefore the *certiorari* does not go to try the merits of the question, but to see whether a limited jurisdiction has exceeded its bounds and has not acted in conformity with the law. It is therefore more beneficial than a *habeas corpus*, which only removes the plaint, the *certiorari* brings up all the proceedings of the Inferior Court for examination and for comparison of its proceedings with the law of its action. The *certiorari* does not take away the jurisdiction of the Inferior Court; and that power, consequently, (1) of Superior Courts of record, to inspect proceedings of Inferior Courts, and enable them to set aside the whole or part of the proceedings of those courts had beyond their power or contrary to their duty or authority, and if partial, to leave the remaining part untouched, clearly exists. Now assuming the legality of the principles above stated, the test of the jurisdiction in this case is, whether the Court of the Commissioners had or had not power to revise and did revise in conformity with the law; not whether the conclusions of that court were true or false, legal or illegal; therefore, in this sense, and in this case, it is unquestionable that the Court of the commissioners had jurisdiction. It appears that the Superior Court, by its judgment upon the *certiorari*, has undertaken to pass upon the proceedings of the Commissioner in the preparation of the schedule, which was revised by the judgment of revision complained of, as well as upon that judgment of revision. It would seem that the judgment of the Superior Court upon the Commissioner's proceedings in the preparation of the schedules is questionable, but that judgment upon the judgment of revision, whether correct or not in part, must stand undisturbed by the court, because being a judgment on *certiorari* this court has no authority to entertain an appeal thereupon. Whatever are the legal attributes of this Court in ordinary cases submitted to it, proceedings upon *certiorari* are subjected to and governed by express enactments which control this Court in such proceedings. By Con. Stat. L. C., cap. 89, proceedings upon writs of prohibition, *certiorari* and *scire facias*, are provided for and regulated, and by the 6th section, it is enacted, that : " Appeals from final judgments rendered under the Act, except in cases of *certiorari*, are provided for

(1) 1 Ld. Raym., 213; 5 Petersdoff, 162.

by chapter eighty eight." By cap. 88, sec. 17, it is enacted: "That an appeal shall lie to the Court of Queen's Bench sitting in appeal, from all final judgments rendered by the Superior Court, in all cases provided for by this Act, and chapter 89, of these Consolidated Statutes, *except cases of certiorari.*" It is true in principle that error in point of law in giving judgment can only be avoided by an appeal, but it is equally true that when that appeal is prevented clearly by statute, the error, if it be one upon the *certiorari*, must stand. Now the words of the statutes as above are clear and precise, and render it imperative upon this Court to declare that the statutory exception as to appeals to this Court, prevents the judgment of the Superior Court upon the *certiorari* in this cause, from being brought within its appellate jurisdiction for any proceeding whatever, and particularly by a writ of appeal, which cannot therefore be sustained.

MEREDITH, Justice: The Provincial Court of Appeals, in the case of Coffin Appellant and Gingras Respondent, (1) allowed an appeal from a judgment upon a writ of *certiorari*; but subsequently the same Court held that there cannot be an appeal in such case. (2) The latter decision seems to me to be justified by the statute defining the powers of this Court, (3) and also by the statute determining the powers of the Superior Court with respect to inferior jurisdiction. (4) The matter in controversy in this cause is as to whether the seigniorial commissioners exceeded their jurisdiction. There is not any sum of money, or property of any kind, in dispute between the parties before us; and therefore the case does not seem to come within any of the categories mentioned in the 23rd section of chap. 77, of the Consolidated Statutes of Lower Canada, which declares in what cases an appeal is allowed from the judgments of the Superior Court. (5) When

(1) Stuart's Rep., 560.

(2) *Bazin* et *Crevier*, *suprà* p. 238.

(3) Con. Stat. L. C., cap. 77, sec. 23.

(4) Con. Stat. L. C., cap. 78, sec. 4.

(5) Dans *Gugy* et *Gugy*, l'Appelant avait fait motion pour permission d'appeler à Sa Majesté en son conseil privé d'un jugement rendu par la Cour du Banc de la [illegible] (en appel), en juillet 1850, sur une opposition à fin d'annuler à l'[illegible]on d'un jugement obtenu contre lui par l'Intimée. Il prétendait que, v[illegible] sommes en litige mentionnées en son opposition, la loi lui accordait ce[illegible]pel. Il a été jugé que, dans l'espèce, l'exécution étant la demande et l'opposition n'étant qu'une exception à cette demande, l'exécution doit régler le recours de l'Appelant ; que l'exécution, ne pouvant être rangée dans aucune des catégories de matières mentionnées par la sec. 30 du ch. 6 des statuts du Bas-Canada de 1793, 34 Geo. III, qui dit : "que le jugement de la "dite Cour d'Appel de cette province sera final dans tous les cas où la ma- "tière en litige n'excèdera pas la somme de cinq cents livres sterlings, mais

in addition to the provision of law already referred to, we bear in mind that by the 17th section of chapter 88, of the Consolidated Statutes of Lower Canada, it is declared that an appeal shall lie to this court from all final judgments rendered by the Superior Court, in all cases provided for by that act, and by the chapter 89, of the Consolidated Statutes of Lower Canada, "*except in cases of certiorari,*" and certain other excepted cases, it seems to me that it cannot have been the intention of the Legislature, either when they defined the jurisdiction of this court, or when they determined the rights of the Superior Court, with respect to subordinate jurisdictions, or when they framed the other provisions of law already referred to, to give a right of appeal to this court, from judgments of the Superior Court in cases of *certiorari;* and I am therefore of opinion that, in conformity with the judgment of this court in the case of *Bazin* vs. *Crevier*, we ought to hold that, according to the law of Lower Canada, there is no appeal in such cases. Whether there ought not to be a right of appeal, in some cases of *certiorari*, is a matter which, it appears to me, is well deserving of the consideration of the Legislature.

"The Court considering that the law does not allow an appeal to this court from judgments rendered by the Superior Court on writs of *certiorari* issued out of this said court, the motion of the attorney general for the quashing and rejection of the writ of appeal issued in this cause, is granted, and the writ of appeal is quashed and rejected." (14 *D. T. B. C.*, p. 457.)

BARNARD, pour les Appelants,
POMINVILLE, pour les Intimés.
DORION, W., pour le Procureur-général.

"dans le cas excédant cette somme ou valeur, aussi bien que dans tous cas "où la matière en question aura rapport à aucun honoraire d'office, droit, "rente, revenu ou aucune somme ou sommes d'argent payables à Sa Majesté, "titre de terre ou d'immeubles, rentes annuelles ou telles semblables matières ou choses, dans lesquelles les droits à venir peuvent être liés, un "appel sera interjetté à Sa Majesté en Son Conseil Privé, quoique la somme "ou valeur immédiate dont est appel, soit moindre que cinq cents livres "sterling...," la motion de l'Appelant est rejetée. (*Gugy* et *Gugy*, C. B. R., Montréal, 16 janvier 1851, STUART, J. en C., ROLLAND, J., PANET, J., et AYLWIN, J., 3 R. J. R. Q., p. 9.)

Dans la cause de *Lespérance* et *Allard* jugée au même terme de la Cour d'Appel devant les mêmes juges, une question analogue s'est présentée sur appel d'un jugement déboutant une opposition à fin d'annuler faite par le Défendeur à la saisie et vente de ses immeubles. Le jugement ayant été confirmé, l'Appelant demanda la permission d'appeler à Sa Majesté en Son Conseil Privé. Cette demande fut rejetée, Sir JAMES STUART J. en C., remarquant que cette opposition ne contenait aucune matière pécuniaire et ne tombait dans aucune des catégories mentionnées dans le statut. (3 R. J. R. Q., p. 10.)

CHEMIN DE FER.—DOMMAGES.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 16 September 1864.

Before DUVAL, Chief-Justice, MEREDITH, DRUMMOND, MONDELET and BADGLEY, Justices.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA, Appellants, *and* MIVILLE, DIT DESCHÊNE, Respondent.

Jugé : 1o. Qu'une Compagnie de chemin de fer est responsable des dommages soufferts par un individu, en raison de ce que, par la construction de son chemin, la Compagnie a coupé certains fossés de ligne qui servaient auparavant à l'écoulement des eaux, et a par cela porté le surplus des eaux dans un cours d'eau sur la terre du Demandeur, laquelle, par l'insuffisance de tel cours d'eau à porter le surplus de ces eaux, a été inondée.

2o. Qu'en pareil cas, la règle de droit qui dit que : " Celui qui, faisant " un nouvel œuvre sur sa propriété, use de son droit sans blesser, ni loi, " ni usage, ni titre, ni possession contraire, n'est pas tenu du dommage " qui pourra arriver ; " n'est pas applicable.

The action was brought for the recovery of the sum of forty-five pounds, damages alleged to have been suffered by the Plaintiff, by reason of his land having been overflowed, in consequence of the neglect of Appellants to keep the ditches on each side of the railway of the company in proper order. The Plaintiff alleged that, by deed of sale, executed at St. Roch des Aulnets, before Michaud, notary, 9th April, 1858, he sold to Defendants a piece of land, described as follows : " La dite pièce ou portion de terre, étant partie d'une terre ou plus grande étendue de terrain appartenant au Demandeur, située au même lieu, et bornée au front par le fleuve St. Laurent, en profondeur par François Miville, et le second rang, d'un côté par François Miville et Ephrem Hudon, et de l'autre côté par Augustin Miville." That the sale was made for the sum of £13,1,11½, and " à la charge par la dite compagnie de faire ériger à ses frais et dépens, chaque côté du chemin à lisses sur la dite terre, une bonne clôture, devant être entretenue par la compagnie ; de fournir au Demandeur un passage convenable, tel que voulu par la loi, pour commnniquer d'une partie à l'autre de la terre à son besoin, et, en outre, d'entretenir le dit passage ainsi que tout cours d'eau qui pourront s'y rencontrer, et qu'elle serait sujette à tous les règlements municipaux relativement à iceux." That, in the place where the railway passed upon his property, it separated the property in two portions nearly equal, the ground there lying low, and that, by the negligence of Defendants to keep up the ditches which receive the waters which flow on each side of the railway, Plaintiff had suffered and suffers continual damages by the overflowing of the waters upon the land of

Plaintiff. The following judgment was rendered: " La Cour, " considerant que le Demandeur a souffert des dommages par " le débordement des eaux des canaux ou fossés de la Défen- " deresse, vis-à-vis la terre du Demande :r, et par le fait de la " Défenderesse, lesquelles eaux ont couvert de temps à autre " une partie de la dite terre, et notamment, dans le cours de " l'été et l'automne 1860, condamne la Défenderesse à payer " au Demandeur la somme de douze louis avec intérêt du cinq " janvier 1861, et les dépens d · la classe de la somme adjugée."

LELIÈVRE, Q. C., for Appellants: In his declaration Respondent alleged, that he had sold to Appellants a piece of land for the purpose of building a railway upon it. The Respondent then alleges that in the place where the railway passes upon his property, it separates the property into two portions, nearly equal; that the ground lies low there, and that by the negligence of Appellants to keep up the ditches to receive the waters which flow upon each side of the railway, Respondent had suffered and suffers damage. Now, upon referring to the voluminous evidence taken on the part of Respondent, it will be found that there is not one word to shew, that, if the waters overflowed at all, such overflowing was caused by the "negligence of Appellants to keep up the ditches which receive the waters which flow on each side of the said railway," on the contrary, all the witnesses produced by Respondent say: that the damage which was alleged to have been suffered by Respondent was so suffered by reason of the line ditches of Respondent's neighbours having been cut by the building of the road, and the waters which usually flowed through these ditches being carried by the lay of the land there, to the land of Respondent and overflowing it; another reason given by Respondents witnesses is, that the ditches of the company on each side of its railway, have been made so deep, that when their waters rise as they usually do in the spring and fall, and after heavy rains, the ditches tap the river, and its waters eventually find their issue over the land of Respondent which it submerges. It is clear that evidence of this description does not support the allegations of Respondent, that it is by the negligence of Appellants to keep up their ditches that the Respondent has suffered damages; in one word, the proof does not quadrate with the allegations. With respect to the law of the case, assuming for a moment that Respondent has fully made out his allegations in evidence, it is respectfully submitted on the part of Appellants that, even supposing that this low land has been flooded by the building of the railway, they are not liable in damages if they have done no more than was absolutely necessary for the building of their road, the sale by Respondent to Appellants of the

ground necessary for the building of the railway, shows for what purpose the land was sold by Respondent and acquired by Appellants, Respondent therefore knew that Appellants were purchasing for the building of their railway. The rule of law in matter of this kind is distinctly stated by some of the most esteemed authors. (1)

(1) Mais, pour qu'un homme puisse être responsable du mal dont il est la cause, il faut qu'il y ait une faute dans son action ; il faut qu'il lui ait été possible, avec plus de vigilance sur lui-même, de s'on garantir.... Partout où un homme nuit à un autre par l'ascendant d'une cause majeure, il est affranchi de la réparation ; il a été l'instrument passif, et non pas la cause déterminante du malheur qui est arrivé. 10 Merlin, Rep., vbo. *Quasi délit*, p. 496.

Celui qui, faisant un nouvel œuvre dans son héritage, use de son droit, sans blesser, ni loi, ni usage, ni titre, ni possession contraire, n'est pas tenu du dommage qui pourra arriver ; par exemple si en faisant une digue pour se garantir d'un débordement, il y exposait davantage celui de son voisin, dans ce cas et autres semblables, les événements sont des cas fortuits et des effets naturels de l'état où celui qui fait des changements a droit de mettre les choses. Si l'ouvrage qu'un propriétaire ferait sur son fonds blessait ou quelque loi ou quelque usage, ou si c'était une entreprise contre un titre, ou contre une possession, le voisin qui en souffrirait quelque dommage, pourrait l'empêcher et se faire indemniser de la perte qu'il aurait soufferte. Celui qui prétend qu'un nouvel œuvre entrepris par son voisin lui fait préjudice, doit se pourvoir devant le Juge, qui pourra faire défense de commencer ou continuer les ouvrages, jusqu'à ce qu'il soit jugé si cet ouvrage doit être défendu ou permis. Merlin, Rept., vbo. *Dénonciation de Nouvel Œuvre*, pp. 501 et 502.

On n'est même pas censé en faute, en faisant ce que l'on était autorisé à croire avoir le droit de faire. A plus forte raison, celui qui ne fait que ce qu'il a réellement le droit de faire, celui qui n'use que de son droit, ne commet aucune faute. S'il en résulte quelque dommage pour autrui, c'est un malheur que l'auteur du fait n'est pas tenu de réparer, et qu'il n'est même pas aux yeux de la loi, censé avoir causé. *Nemo damnum facit, nisi qui id facit quod facere jus non habet.* Par exemple, en creusant un puits dans mon fonds, je détourne la source qui alimentait le puits inférieur de mon voisin. C'est un dommage qu'il éprouve, et qu'il éprouve par mon fait ; mais je ne suis point tenu de le réparer, parce que je n'ai fait qu'user de mon droit, sans commettre aucune faute. Il en est encore de même si je détourne la source, *caput aquæ*, qui prend naissance dans mon fonds, et dont les eaux, depuis un temps immémorial, servaient à fertiliser les fonds inférieurs, ou même que le propriétaire de ces fonds avaient réunies dans un canal, pour alimenter un moulin qu'il fait construire plus bas. Je ne suis point obligé de réparer le dommage que cause le détournement de ma source. Telle est la loi de la propriété. 11 Toullier, No. 119, p. 151.

Nullus videtur dolo facere qui suo jure utitur. Loi 55 ff de R. J.

" Icelui n'attente qui n'use que de son droit," dit l'art. 107 de la *Coutume de Bretagne*. C'est une maxime fondée sur la raison et universellement reçue. " Celui qui use de son droit sans en excéder les justes limites, n'est point tenu " à réparer le dommage causé à un autre par l'exercice de ce droit." *Code Prussien*, 1re part., tit. 6, no. 36 ; *Code Prussien*, ibid., no. 37.

11 Toullier, p. 150, note.

Ainsi donc, tous les actes qui ne sont point nuisibles à la société, et qui ne portent atteinte ni aux *droits personnels*, ni aux *droits réels* d'autrui, sont permis, et ne peuvent être empêchés ni punis, quand même ils causeraient quelque dommage ou préjudice à d'autres personnes : car remarquez bien qu'il n'y a que les attentats à *leurs droits* qui soient défendus. Si, en exerçant les miens, sans en excéder les justes limites, je cause à autrui du dommage, je ne suis point tenu de le réparer, parce que je n'ai fait qu'user de mon droit, qu'il est lui-même obligé de respecter. Nous en avons déjà vu des exemples *suprà*, no. 119. 11 Toullier, No. 122, p. 155.

CARON, pour l'Intimé : Les témoins du Demandeur se sont tous accordés à prouver les faits suivants : La terre de l'Intimé, ainsi que les terres voisines, jusqu'à la distance de plus de quinze arpents de chaque côte s'inclinent légèrement du sud vers le nord, et toutes ces terres sont égoutées par leurs fossés de lignes, respectifs, qui coulent du sud vers le nord. Jusqu'au temps de la construction du chemin de fer, les dits fossés de lignes ont toujours suffi à égouter la terre de l'Intimé et les terres voisines. Lors de la construction du chemin de fer, l'Appelante a fait creuser, de chaque côté d'icelui, deux fossés ou canaux d'environ dix pieds de largeur, sur une profondeur de deux pieds et demi. Au moyen de ces deux canaux qui coupent tous les fossés de lignes de la terre de l'Intimé et de celles qui l'avoisinent, l'Appelante a changé le cours naturel de l'eau, sur les dites terres. Le *niveau de la terre de l'Intimé se trouvant un peu plus bas* que celui des terres voisines, l'eau qui avant la construction du chemin de fer s'écoulait par les fossés de lignes des dites terres, prend maintenant son cours par les fossés ou canaux de l'Appelante jusqu'à l'endroit où le chemin de fer traverse la terre de l'Intimé. Rendue là cette eau n'ayant pas d'issue du côté de l'est, coule sur la terre de l'Intimé vers le nord jusqu'à la rivière. Dans les eaux un peu abondantes, une grande partie de l'eau de la rivière, au lieu de suivre son cours ordinaire, à l'endroit où elle traverse le chemin de fer, coule dans les fossés ou canaux de l'Appelante vers l'est, jusque sur la terre de l'Intimé, sur laquelle elle se répand en coulant vers le nord. Ces témoins prouvent aussi que les inondations de la terre de l'Intimé dans le printemps, l'été et l'automne 1860, ont causé plus de trente louis de dommages à l'Intimé. L'Appelante a essayé de contredire une partie de cette preuve par des personnes étrangères à la localité en question, dont les témoignages ne peuvent avoir aucun poids. L'Appelante a soulevé la question de droit, savoir : si elle était responsable de dommages causés à l'Intimé en usant de son droit de construire un chemin de fer. Sans doute que l'Intimé ne conteste pas à l'Appelante le droit d'user de sa propriété, mais pouvait-elle au moyen des canaux qu'elle a creusés, changer le cours naturel de l'eau et inonder la terre de l'Intimé ? Pouvait-elle aussi changer le cours ordinaire de la rivière et conduire une partie de ses eaux jusque sur la terre de l'Intimé sans être responsable des dommages ? Une pareille proposition n'est certainement pas soutenable. Au reste l'acte d'incorporation de la Compagnie du Grand Tronc permet à l'Appelante de construire un chemin, pourvu qu'elle ne fasse aucun dommage ; cet acte lui permet aussi de faire passer le chemin de fer sur les rivières, mais à la condition expresse de remettre les lieux tels qu'ils étaient auparavant.

(1) L'Appelante a creusé les bords de la rivière et les a laissés en cet état, ce qui a causé en grande partie les inondations dont se plaint l'intimé.

MONDELET, Justice: Had I had to decide this case alone, I am inclined to say that I would have dismissed the action, inasmuch as the evidence adduced by Plaintiff and Defendants is so contradictory, that Plaintiff and Defendants should have had the benefit of such contradictions, and the doubt consequent thereupon. I am, therefore, of opinion that Appellants should be maintained in their appeal, and the judgment of the Court below reversed. Another reason for this is, that, from the evidence, it is *impossible* to make out, in any way, to what extent, how, where or in what precise manner, the Grand Trunk's ditches have caused the pretended damage. Supposing there has been any damage so caused, there is no evidence whatever of its *reality*. Witnesses *estiment en bloc* as they say, but they acknowledge they are unable to do it *en détail*. As to the two questions of law, I believe the pretensions of Appellants to be unfounded. 1o. The damages, if they actually had been occasioned as pretended by Respondent, would be recoverable, as a compensation independant of the price allowed at the time of the expropriation. 2o. The damage in question is, evidently, to be recovered by an action at common law, and not by arbitration.

DRUMMOND, Justice: The evidence establishes, in my opinion, the fact of the Respondent's having suffered damages by the act and neglect of Appellants, The Grand Trunk Railroad Company, to an amount even beyond that which Appellants were condemned to pay by the judgment appealed from. By law as well as under a special covenant in the deed of sale, by which the Grand Trunk Railroad Company purchased a portion of Respondent's land for the track of the Railroad running across Respondent's farm, the company is bound to maintain the water courses running through his land. Instead of doing this, the company changed the natural course of the line of ditches "*fossés de ligne*," by constructing drains on each side of the Railway line, thus cutting across the line ditches and throwing the surface water over a part of the Respondent's land, which is on a lower level than the adjoining farms. It was no doubt necessary that ditches should be cut on each side of the Railroad line, but it was the duty of the company to construct these ditches, and the culverts connected therewith, in such a manner as to drain the lands, through which the line runs, as effectually as they had been drained before the construction of the road, by the old water

(1) Stat. R. du C. ch. 66, sec. 9, par. 5.

courses. The evidence adduced by the company is almost entirely of a negative character, having no reference to the time when the injury complained of occurred, all the Appellants' witnesses examined the land only on one and the same occasion, at the request of the officers of the company, after the action had been brought. They know nothing about the state of the land during the time when the damages are alleged to have been occasioned. Out of the eleven witnesses brought up by Appellants, no less than five were *employés* of the company, and the remainder are persons who resided at a distance from Respondent's farm. On the other hand Respondent's witnesses reside in the immediate neighborhood, of the farm. Most of them were in the habit of visiting it frequently during the season when the injury is alleged to have been sustained, and are unanimous in their opinions, save some difference in the estimation of damages. They do not appear to have any interest in the matter ; and, taking everything into consideration, I do not think the weight which their testimony should have in the decision of the case, has been materially impaired by the evidence adduced on the part of Appellants. The judgment should therefore be confirmed.

MEREDITH, Justice : It is, I think, proved that the drains of the Railroad, during freshets, cause to some extent, an accumulation of water on the parts of Respondent's farm which adjoin the road. But it is also proved that the drains on the Respondent's farm, were, at the time of the alleged injury, in very bad order ; so much so as to make it impossible to say, what proportion of any damage actually sustained, is attributable to the drains of the Railroad. Besides this Respondent ought to have given notice to Appellants when, as he contends, he ascertained, that the drains were injuring him ; (1) and had this been done, the true extent and cause of the damage, could have been ascertained. No such notice however was given ; and the consequence is that it is impossible to say, with any thing approaching certainty, for what part the Railway company ought to be held liable. I am satisfied however that the sum of $50, awarded to Respondent, is amply sufficient to cover the *whole* of his loss ; and as, in my opinion, that loss was mainly owing to the natural situation and defective drainage of his farm, I think the Appellants have reason to complain of the whole loss having been thrown upon them. In this, as in most cases of the same kind, there is a very great discrepancy between the *opinions* of Plaintiff's witnesses, as to the sum that ought to be award-

(1) See on this subject, *Chase vs. New York Central Railway*, 24 Barbour's Rep., p. 285, cited in Redfield, on Railways, p 154, note 6 ; also *Lemmex vs. Vermont Central Railway* cited same page and note.

ed to him, and the *facts* to which they testify; and in forming my judgment, I need hardly say, I have been guided by the facts proved, and not by the speculative opinions of the witnesses, many of whom have made estimates, which, even upon the face of them, are utterly unreasonable. I now pass from the consideration of the facts, to the questions of law raised in this cause. On the part of Appellants it has been strenuously contended that if they have done nothing more than was necessary for the building of the road, Respondent, even if he has sustained damage, cannot make any claim against them, for having in a proper manner, exercised powers conferred upon them by the Legislature. The pretensions of Appellants in this respect are stated in their factum as follows: "The Appellants submit, that even supposing that this low land has been flooded by the building of the railway, they are not liable in damages, if they have done no more than was absolutely necessary for the building of their road, the sale by Respondent to Appellants of the ground necessary for the building of the railway, shows for what purpose the land was sold by the Respondent and acquired by the Appellants, the Respondent therefore knew that the Appellants were purchasing for the building of their railway, and it cannot be doubted that the amount asked by the Plaintiff, and paid by the Defendants, was intended to cover such damages as those pretended to have been suffered by the Plaintiff." The point thus submitted is of great importance; but I do not think the claim advanced by the Appellants can be maintained. It is doubtless proved that the Appellants have not done anything beyond what by law they are authorized to do; and consequently they cannot be treated as wrong doers. But if it be true, as it is, that the law empowers the Appellants to build the road, and therefore to make the drains necessary for the purposes of the road; it is also true that the law requires that compensation shall be made to the owners and occupiers of land injuriously affected by the construction of the Railway. The provision of our Railway clauses consolidation act, on this subject, is as follows: "And compensation " shall be made to the owners and occupiers of and all other " parties interested in any such lands so taken or injuriously " affected by the construction of the Railway, for the value " and for all damages sustained by reason of such exercise, " as regards such lands, of the powers by this or the special " act, or any act incorporated therewith, vested in the com- " pany; and, except where otherwise provided by this act or " the special act, the amount of such compensation shall be " ascertained and determined in the manner provided by this

"act." (1) The Appellants, however, say that if the Respondent really has sustained any damage, he has been compensated therefor, and they refer to the deed of sale by which the Respondent sold to the Appellants that portion of his farm required for the purpose of the Railway. In that deed it is declared that the price therein mentioned is: "Pour le prix "et la valeur de la dite pièce ou portion de terre, et pour le "montant de la compensation accordée à la dite partie de la "première part pour tous dommages, lui résultants par suite "de l'expropriation d'icelle pièce ou portion de terre." As a general rule, I think it may be said that the compensation awarded, or agreed upon, for land taken for the construction of a Railway ought to be regarded as covering, "all such "incidental loss, inconvenience, and damage as may *reason-* "*ably be expected to result* from the construction and use of "the road in a legal and proper manner." (2) But it cannot, in the present case, be presumed that the Respondent, when his land was taken, knew what drains would be made by the Railway company, or how those drains would affect *the remainder* of his property. And if proof were wanting to show that the damage, of which the Plaintiff complains, was not foreseen and estimated when a part of his land was taken, it would be found in the pretensions of the Appellants that their drains *do not cause and cannot cause*, either in whole, or in part, the damage of which the Respondent complains. I therefore think that if the land of the Respondent is *injuriously affected* by the drains of the Railroad company, the damages, claimable on that account, cannot be regarded as a part of the damages for which the Respondent received compensation when his land was taken. In support of this view, I may refer to the *Lancashire and Yorkshire Railway Company* vs. *Evans*, (3) in which, according to the marginal abstract, it appears that "a land owner received, "under arbitration, compensation for land and *in respect of* "*damages which might be sustained by reason of making a* "*railway*," and it was held "that he was not precluded from "insisting on a further compensation for future unforeseen "damages subsequently sustained." In disposing of the case, Sir John Romilly, the Master of the Rolls, observed: "I am "of opinion that the contract means nothing more than this,

(1) 14 and 15 Vict., cap. 51, sec. 4, *The Railway Clauses Consolidation Act*, and see Con. Stat. C., cap. 66.

(2) Redfield, on Railways, page 152, § 74, page 154, No. 6; Pierce, on Am. Railroad Law, page 224.

(3) *Lancashire and Yorkshire Railway Company* vs. *Evans*, 19 En. Law, and Eq. Rep., 295.

" we can now ascertain what damage has already been done, " and what in the ordinary working of the line will be the " sort of damage which will probably be produced; that " damage is meant to be compensated by this contract; but " any future extraordinary damage is not intended to be in- " cluded in it." (1) In considering the english authorities on the subject, it is proper to bear in mind, that the english " Railway clauses consolidation act of 1845" (2) makes special provision for the protection of persons owning lands adjoining Railways, with respect to the drainage of such lands and that no special protective clauses are to be found in our statutes on the same subject. It therefore follows that the general clause, in our law, securing the owners of land, adjoining a Railway, compensation for any damage to which they may be subjected by the Railway works, must comprise an important class of cases not intended to be included in the *general* clauses at the English Railway acts on the same subject; and this may account for our not finding many cases in the English Reports analogous to the present. The Appellants also contended at the argument before us that the proof of the Respondent does not quadrate with his allegations; the pretension of the Appellants being that one description of negligence is alleged and another proved. I do not however think that this objection could have been maintained, even if taken in due season. But, be this as it may, the evidence of record has been adduced without objection, and there certainly is not such a variance between the allegations and the proof as to make the evidence so taken valueless. Upon the whole I would give the Respondent a sum sufficient to show that we admit his righ of action; but I think £12 is considerably more than the Defendants ought to have been condemned to pay, because, as already observed, the damage of which the Respondent complains is attributable, partly to the natural situation of his own land, and partly to his own negligence. There are many cases in which the judgment of the Superior Court ought not to be disturbed on account of a sum so small, as that, in respect of which, I think the judgment now before us, ought to be modified; but it seems to me that by the judgment now in question, the Appellants are made to pay at a *high rate* for the *whole* of damages, the *greater part* of which is attributable to the negligence of the Respondent, and the situation of his

(1) *Vide* also Pierce, on Am. Railway Law, page 230. Also 16 Ad. and El. N. S., 851, *Lawrence* vs. *Railway Co*; 99 E. C. L. R., p. 229, *Brogden* vs. *Llynvi Railway Co.*

(2) See 8 Vict., ch. 20, sec. 68, also see 16 of same act; Appendix to Wordsworth on Railway, 68, page 176; 2 Shelford, Am. Ed., page 678.

land, and, besides this, the present is one of a class of cases in which I deem it of special importance that the opinions of the Court should not be misunderstood. On my part I desire the Appellants to know, that the legal pretensions advanced by them in this cause cannot be maintained; and, on the contrary, that they are liable to pay for damages such as those complained of in the Plaintiff's declaration, when really caused by their works; but at the same time, I feel we ought not to encourage land owners to neglect their drains, and then when they suffer damage from their own negligence, to seek, by litigation, to throw the loss upon others. The judgment of the Court below in my opinion, does, in effect, hold out such encouragement, and therefore, I think, ought not to be confirmed without modification.

" Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour de Circuit, siégeant à St-Jean-Port-Joly, comté de l'Islet, district de Montmagny, le 3me jour d'octobre 1862, et dont est appel, confirme le dit jugement." *Dissentientibus*, l'Hon. M. le juge MEREDITH et l'Hon. M. le juge MONDELET. (14 *D. T. B. C.*, p. 469.)

LELIÈVRE, Q. C., for Appellants.

CARON, for Respondent.

LEGATAIRE.—USUFRUIT.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 9 mars 1864.

Before DUVAL, Chief-Justice, MONDELET, BERTHELOT and MONK, Justices.

THE BANK OF MONTREAL, Appellants, *and* MCDONELL *et al.*, Respondents.

Jugé : 1o. Que, par l'institution en vertu d'un testament d'une personne comme légataire résiduaire, telle légataire est saisie de la succession du testateur après le décès de ses exécuteurs, et a le droit de recouvrer des actions de Banque tenues aux noms des exécuteurs décédés, ainsi que les dividendes sur telles actions.

2o. Que telle légataire résiduaire a droit d'obtenir jugement pour la transmission de telles actions, nonobstant la 17me section de la 19 Vic., chap. 76, la légataire ayant fait une déclaration, " comme héritière, fille et légataire universelle" de son père, et comme étant en possession depuis le décès des dits exécuteurs de l'exécution ultérieure du testament.

3o. Qu'en vertu de la 9me clause du testament en question, la demanderesse devait être considérée comme ayant non seulement un droit d'usufruit dans la succession, mais aussi un droit de propriété en icelle.

This was an action brought by Ann McDonell, the daughter, and Ann Cameron, the widow of Allan McDonell, to compel the transmission to Ann McDonell of fifty-three shares

of stock in the Bank of Montreal, standing in the Bank Register in the names of Sir George Simpson and Duncan Finlayson, executors of the will of Allan McDonell, and for the amounts of dividends payable on the 1st December, 1862. By the last will of Allan McDonell, dated 31st May, 1859, (with a codicil of 31st May, 1859, which does not affect the present case) the testator directed his debts to be paid, made several special legacies, and bequeathed to his wife, during her life, an annuity of two hundred pounds, to be secured out of the residue of his estate, and further the right to occupy during her life the house in which he lived, situate on the mountain in the city of Montreal. He then went on to will as follows: "*Ninth.* I will and bequeath the said house, lands and premises, in the said City of Montreal, and also all my household furniture, plate, plated-ware, horses and carriages (subject nevertheless, to the bequests contained in the eighth clause of my will), *to my daughter Ann, and her lawful heirs*, as her and their own sole and absolute property and effects for ever, and to be by her owned, possessed and enjoyed as her own property, free from marital control; on the express condition that the same be exempted, and in no way held liable for the debts of herself or any husband whom she may marry, and that they shall be appropriated for her maintenance and support, and be altogether *insaisissables, hereby constituting my said daughter my residuary legatee.*" "*Eleventh.* I name as my Executors and Trustees, for all and every the purposes hereinbefore mentioned, Sir George Simpson, of Lachine, and Duncan Finlayson, of the same place, and the survivor of them: and I do will and desire that, for the payment of the annuities and legacies hereinbefore mentioned, and for the proper securing the several sum and sums of money hereinbefore disposed of, they do get in and dispose of all or so much of my estate and effects as they deem best; and I do hereby expressly continue the powers and authority of my Executors beyond the year and day limited by the law of Lower Canada, and expressly give them power to sell all my real estate of which I may die possessed, except that hereinbefore specially bequeathed, any law, usage or custom to the contrary, notwithstanding; willing and directing that all and every their powers and authority shall continue until the final accomplishment of this my last will and testament; and I do confer on my Executors and Trustees the fullest and most ample powers which can, by law, be conferred on or exercised by Trustees." Shortly after the testator's death, which took place on the 16th June, 1859, Sir George Simpson and Finlayson proved his will and made an inventory of the estate. By that inventory there

appeared to be in the testator's estate 83 shares of the stock of the Bank of Montreal, and these were afterwards transferred, in the Register of the Bank, from the name of the testator to that of his Executors. Sir George Simpson died in 1860, and Finlayson afterwards acted alone, until he died in July, 1862, when there remained in the names of the two Executors 53 of the testator's 83 shares of the Bank of Montreal stock. Ann McDonell claimed these 53 shares, as appears by a paper filed at *Enquête*, and, in February, 1863, made declaration to the Bank, demanding that the shares should be transmitted to her as heiress at law (daughter), and universal legatee of her father. As the Bank did not recognize her rights, the action was instituted to compel the Appellants to *transmit* to Ann McDonell, one of the Respondents, and the widow having an annuity and usufructuary rights, joined with her daughter, Ann McDonell, in the action. In the declaration against the Bank, the Respondents alleged, among other things, that "all the trusts and duties which were imposed upon the said Simpson and Finlayson, as executors, or otherwise have been executed, all particular legacies and all debts paid; the legacies to his widow and those to his sons have all been taken by the said widow and sons respectively in lieu of all other rights, and the sons have accepted them waiving all heirship rights whatever, and those sons and the Plaintiff Ann McDonell were and are the only children of the testator," and "that said 53 shares formed and form part of the residue of the estate of the said late Allan McDonell;" Ann Cameron for herself declared she ratified the will of Allan McDonell, and both alleged that Ann McDonell was entitled to have the 53 shares in question transmitted to her; and the dividends $424, paid to her; they concluded accordingly. By their first plea the Appellants admitted all the facts mentioned in the Plaintiff's declaration as "leading facts" to be true; but they alleged that the action could not be maintained, because the testator by the eighth and ninth clauses of his will had willed as therein stated, and by the eleventh had named Sir George Simpson and Duncan Finlayson his executors and trustees, as appeared by the said will; that after the testator's death his eighty-three shares in the Bank of Montreal were, by a declaration of transmission made in accordance with the 17th section of the 19th Vic., cap. 76, duly transmitted to the names of the executors and trustees; that neither of those executors and trustees had died intestate, but that each had made a will and appointed executors in Canada; that at the death of Finlayson, the survivor of the executors and trustees, he was possessed of 53 of the said 83 shares, and his executors were bound to account for

them, not to the Respondents, but to the residuary legatee, or other, the legal representative of the testator under his will; that the Appellants did not know, and could not legally be held or bound to know, whether the said 53 shares and the dividend thereon did or did not form the residue of the testators estate to which the said Ann McDonell might, as his residuary legatee, be entitled; and that without a declaration of transmission made by her as residuary legatee in accordance with the aforesaid section of the Appellants' charter the Appellants could not be legally held or bound to transmit the said shares, or allow them to be transmitted in their books from the names of the executors and trustees, to the name of Ann McDonell, as the testator's residuary legatee, or to pay her the dividend thereon. The evidence adduced by the Plaintiffs consisted of the will and codicil of Allan McDonell; the inventory; a copy of an account by Sir G. Simpson and D. Finlayson's executors, proposed to be rendered to the Plaintiffs, in which account the residue of Allan McDonell's estate is stated, (including the 53 shares in question); a declaration of transmission dated 14th February, 1863, by which Ann McDonell, as heiress at law, daughter, and universal legatee of her father, Allan McDonell, and as having from the death of his executors, any further executorship of his will, claimed in virtue of the 19th Vic., cap. 76, the 53 shares of stock standing in his executor's names, as part of the residue of his estate bequeathed to her; and, lastly, a receipt *sous seing privé* from Angus C. McDonell, and a notarial release and discharge from the same as curator to John L. McDonell, an absentee, for the special legacies of £100 bequeathed to the former, and £500 bequeathed to the latter, the absentee, by their father, Allan McDonell. An admission was signed by the Defendants by which they admitted service upon them, before action brought, of the petition and declaration of the Plaintiff Ann McDonell, dated 14th February, 1863, and vouchers. On behalf of the Appellants there were adduced copy of the will of Finlayson, and the Respondent's admission that shortly after Allan McDonell's death, his 83 shares of stock were duly transmitted to the names of Sir George Simpson and Finlayson, his executors, and in their names, as such executors, and that 53 of those shares remained at the death of Finlayson, and had ever since so remained. The parties having been heard on the merits, the Superior Court, BADGLEY, Justice, rendered the following judgment on the 30th day of May, 1863: "The Court, considering, that by the "last will and testament of the late Allan McDonell, certain "particular legacies were thereby bequeathed, and the said

" testator did also thereby bequeath to his wife, to wit: Ann " Cameron, for and during her life, the annuity in money and " the usufruct of his residence, in the will mentioned, and did " further bequeath to Ann McDonell, certain effects as stated " in the said will, and did thereby constitute Ann McDonell " his *residuary legatee*, to wit, of his the Testator's said estate: " And considering, that in and by the said last will, the said " testator did thereby nominate and appoint Sir George Simp- " son, and Duncan Finlayson, and the survivor of them, to be " the executors and trustees of his said will, for the purposes " thereof, and to carry the same into effect, who did enter " upon the execution of the said will, and the performance of " the said trusts therein mentioned, and did cause an inven- " tory of the said estate to be duly made by Hunter and col- " league, public notaries, at Montreal aforesaid, bearing date " the sixth day of August, 1859, whereby, among other effects " and property of the said testator and of his said estate, " there were eighty-three shares of stock of the Bank of " Montreal, the said Defendant, belonging to the testator: " Considering, that subsequently to the assumption of the " estate by the executors and trustees, they did obtain a " transfer of the said shares to be made to them in the books " of the Defendant, to stand in their names as such executors " and trustees, whereof fifty-three shares still stand in their " names, as such executors and trustees: Considering, that " previous to the institution of this action, the executors and " trustees have both deceased, after having paid the debts and " particular legacies of the said testator, and fulfilled the " trusts of the will, save as to the annuity and usufruct to " Ann Cameron: Considering that Ann Cameron hath joined " in this action, and hath in and by the said declaration de- " clared her satisfaction and confirmation of the will, and " that Ann McDonell hath, by law, as sole residuary legatee " of the said testator, *saisine* of the residue of the said estate, " including therein the said fifty-three shares of stock of the " Bank of Montreal, and of the dividend thereon accrued " since the decease aforesaid of the said executors and trus- " tees, and of the survivor of them, the said dividend amount- " ing to the sum of four hundred and twenty-four dollars: " Considering, that Plaintiff, Ann McDonell, hath by law and " by her said *saisine*, and by and with the consent of Ann " Cameron, by the latter testified by her becoming party to " the action with Ann McDonell, a right to be put into pos- " session of the said fifty-three shares of stock, and of the " sum of four hundred and twenty-four dollars, standing in " the books of the Defendant in the names of the Executors " and Trustees: Doth order and adjudge, that the said fifty-

"three shares of stock of the Bank of Montreal be trans-
"mitted from the names of Sir George Simpson and Duncan
"Finlayson, Executors and Trustees, to the name of Ann
"McDonell, and that Defendant do record the said transfer
"to her in the register of shareholders of the said Bank of
"Montreal; and further, do pay to Ann McDonell the said
"sum of four hundred and twenty-four dollars, the amount
"of the dividend upon the said shares, accrued as aforesaid."

GRIFFIN, Q. C., and BETHUNE, Q. C., urged: 1o. That the judgment of the Superior Court was erroneous in assuming that, by his will, Allan McDonell constituted his daughter his universal legatee, or absolutely his residuary legatee; that the testator's intention was to give his daughter only a *life interest* in such residue of his estate as should remain after the regular payment of an annuity of £200 per annum had been secured to his wife, and that that life interest was to be for his daughter's support, "to be free from material control," and to be "*insaisissable*:" 2° That the Court below erroneously assumed that, before their deaths, the executors and trustees, and the survivor of them, had "paid the debts "and particular legacies of the testator, and fulfilled the trusts "of the will, save as to the said annuity and usufruct to the "said Ann Cameron," or, in other words, that the special allegation to that effect, contained in the Respondents' declaration, had been proved by them: 3° The Court below erroneously declared in effect, that the Respondent, Ann McDonell, is the sole residuary legatee of the testator, and, as such, has had, since the death of the survivor of his executors, by law, the *saisine* of the residue of his estate, including therein the said fifty-three shares of the Appellants' capital-stock, and the dividend accrued thereon; and that, therefore, with the consent of the other Respondent, Ann Cameron, testified by her being a Plaintiff in the action, she has a legal right to be put in possession of the said fifty-three shares, and to be paid the dividend thereon, as part of the *residue* of the testator's estate: 4° The Plaintiff's exhibit by which she prayed for the transmission of the shares to her, was not mentioned in their declaration, and it was insufficient. That by it Ann McDonell claimed the shares as "heiress at law, daughter, and universal legatee" of Allan McDonell; now, *aucun ne peut être héritier et légataire d'un défunt ensemble*; there was nothing in the will to show that Ann McDonell was her father's universal legatee, and her right to the "further executorship" of the will might well be called in question, seeing that when no executor is appointed, or when the executorship is renounced, or becomes, by death or otherwise, vacant, the *heir* of the testator has the execution of his will.

(1) Ann McDonell was certainly *an* heir of her father, but, as his will disclosed that she had brothers, she was not the *only* heir, and, therefore, she could not, alone, have the " further executorship " of the will.

. MACKAY, for Respondents. The testator expressly makes his daughter Ann, his residuary legatee, unqualitiedly. It is impossible to conceive a residue that does not involve an universality. Ann McDonell is universal legatee of her father. (2) She is also his heiress at law. Since the death of the last of the executors she has had by law the *saisine* of the testator's estate. The only person having possible adverse interests joins in the action, consenting that judgment pass in favor of Ann, the universal legatee. The executors never had but a qualified *saisine*; their possession was for the heir. (3) The *saisine legale* always was in the heir. (4) After the death of Finlayson, total *saisine* was in the heirs, and anything further of executorship that remained to be done was for the heirs to do. (5) *Aucun ne peut être héritier et légataire ensemble*," says the Bank; but the article of the custom shows the reason of that rule, reason which has, long ago, ceased. There is not incompatibility in Lower Canada now. (6) The question now is interesting only in regulating successions and *communautés*. What is taken *à titre de légataire* makes *acquêts* unless the *legs* be by an ascendant. If a person be heir and legatee of a collateral, and take in quality of heir he makes *propres*, but if of legatee, he makes *acquêts*. As it is more interesting to have two titles than one, Miss McDonell stated two, in her petition and declaration to the Bank. But supposing there was incompatibility in Miss McDonell calling herself heiress and legatee, the Bank cannot oppose it. (7) " Miss McDonell was not the only heir," says the Bank. To this the Respondents say, the others have taken their particular legacies, and do not show themselves. So long as they do not come forward, as *héritiers acceptants*, Miss McDonell is free to act; and, though only one heir, may be awarded the

(1) Pothier, *Don. Test.*, ch. 5, p. 359, 1ère part. ; 7 Guyot, Rep. de Jur., vbo. *Exr. Test.*, p. 158 ; 8 Nouv. Den., vbo. *Exr. Test.*, p. 209, Nos. 2 et 4 ; 4 Furgole, *Des Testaments*, ch. 10, s. 4, p. 162, No. 43.

(2) Dalloz, *Rec. Per.*, 1841, 1ère part., p. 159 ; *Ibid.*, 1851, 2d part., pp. 99, 100 : *Ibid.*, 1855, 1ère part., p. 73.

(3) Pothier, *Cout. d'Orl.*, p. 568, *quarto*.

(4) *Ib.*, pp. 528. 529 *quarto*, Nos. 121, 125.

(5) Pothier, *Cout. d'Orl.*, p. 569.

(6) See art. 42 of the cust. by Valin ; 3 Cochin, *octavo edt.*, p. 246.

(7) Merlin, Rep., vbo. *Héritier*, sec. 10, art. 4 ; Cochin, 619, vol. 36, *octavo*, 39th cause of old Edn.

totality of the succession. (1) " The Plaintiff's exhibit marked A was not mentioned in their declaration ; it ought to have been recited," says the Bank. But the Bank consented to the filing of that exhibit, and admitted service of it upon it before action ; now after judgment it would, as it were, arrest judgment, although aware that after a verdict the judges will do what they can to help the declaration. (2) Again, the Bank charter, 19 Vic., only enacts two things against stockholders, so long as their declaration of transmission is not served and authenticated : 1o. no profits are to be received by such stockholders : 2o. such persons shall not vote. In the present case, before the Bank was ordered to pay, proof had been made, by its own admission of service before action, of Miss McDonell's declaration of transmission. No profits of the Bank are to be paid to Miss McDonell before transmission authenticated by her declaration in writing, left with the Bank, before action, in compliance with the 19 Vic. The Bank is without a grievance.

MONDELET, *dissenting*. Stated that the action was brought to obtain a transfer of 53 shares of stock in the Bank of Montreal, by Ann McDonell, calling herself universal residuary legatee. Now there were several other heirs, and she was but one of several universal legatees ; there being no proof of renunciation by any of them. He would therefore be for the dismissal of the action.

DUVAL, Chief-Justice : The special clause in the Bank charter had been set up, but it was difficult to see for what good reason. It was evident the Plaintiff was "residuary legatee," what was that but *universal* residuary legatee. The residuum was hers. It was urged that she should have taken her recourse against the executors of the executors, but this was strange doctrine to be held under the law of this country. He could not see any reason for contesting the Plaintiff's claim, and the judgment below must be confirmed with costs. Judgment confirmed. The Appellants obtained leave to appeal to the Privy Council. (14 *D. T, B. C.*, p. 482.)

GRIFFIN, Q. C., for Appellants.
BETHUNE, Q. C., Counseil.
MCKAY and AUSTIN, for Respondents.

(1) 2 Proudhon, *Usufruit*, p. 149, Drt. d'Usage ; Simonnet, *Saisine Héred.*, p. 117, note.

(2) 2 Burr., p. 9[illegible].

INSURANCE.—POLICY.—CONSTRUCTION.

COURT OF QUEEN'S BENCH, Montreal, 1st June, 1864.

In Appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, A. J., MONK, A. J.

BENJAMIN GRANT, Plaintiff in the Court below, Appellant, and THE EQUITABLE FIRE INSURANCE COMPANY, Defendant in the Court below, Respondent.

Held: 1o. That the following words in a fire policy, "On the hull and joiner work of the steamer Malakoff, (now in Tate's dock, Montreal,) *navigating the river St. Lawrence, between Quebec and Hamilton, stopping at intermediate ports*, including outfitting in the spring two thousand four hundred dollars; on the engine therein, one thousand six hundred dollars, as per application, No. 17783, filed in this office," describing the subject insured, imported an agreement that the vessel was navigating and to navigate.

2o. That the words must be considered to be a warranty, and the engagement not having been performed, the insurer was discharged.

3o. That in view of the warranty on the face of the policy and the admitted breach of it, the verdict of the jury was of no avail, and the Court must look to the law beyond the verdict and dismiss the action.

4o. That by law and the practice of the Superior Court, the Respondent was well founded in moving for judgment in their favor.

This was an appeal from the judgment of the Superior Court, (BADGLEY, J.) which was fully reported, 9 *R. J. R. Q.*, p. 320.

MEREDITH, J.: At the argument, and before I had an opportunity of fully considering the terms of the policy, I was under the impression that, in principle, this case was the same as *Grant* vs. *The Ætna Insurance Company*; and if it were so, it would, doubtless, be our duty in disposing of it, to be guided by the judgment of the Privy Council in that case. But, after carefully considering the two policies, it appears to me that there is a material difference between them, and that, according to the doctrine laid down in *Grant* vs. *The Ætna Company*, the judgment now under our consideration ought to be confirmed. In the Ætna case the policy of insurance described the Malakoff as "now lying in Tate's dock, Mon- " treal, and intended to navigate the St. Lawrence and Lakes, " from Hamilton to Quebec, principally as a freight boat, and " to be laid up for the winter in a place to be approved by " this Company." The Lords of the Privy Council decided that the words of that policy did not imply a contract to navigate and that, as Appellant did not, after the date of the policy, remove the boat for the purpose of navigation, he was not bound to cause her "to be laid up for winter in a place

to be approved of by the company;" and they therefore held, although the boat was not laid up for winter in a place approved of by the Company, (as we thought the policy required) that the insurers were liable for the loss. But, with reference to the words of the policy respecting the navigation of the boat, their Lordships observed, "If they import an "agreement that the ship shall navigate in the manner "described in the policy, they must be considered a warranty "and the engagement not having been performed, whether "the engagement *was material or not material*, the insurers "are discharged." Their Lordships, in the portion of their judgment just cited, spoke of a warranty with respect to something to be done; but the rule would be the same with respect to the warranty of a fact as existing. (1) In the present case the steamer is described, in the policy, dated the 5th August, 1858, and covering the period from the 30th day of June, 1858, until the 30th day of June, 1859, as follows: "The steamer Malakoff (now in Tate's Dock, Montreal), na- "vigating the river St. Lawrence between Quebec and Hamil- "ton, stopping at intermediate ports;" and the answer of the Jury to the question, "Was the steamer Malakoff on the 30th day of June, 1858, or at any other period between that date and the 30th day of June, 1859, navigating the St. Lawrence between Quebec and Hamilton," is simply "no." Here then we have an unqualified negation by the jury of a fact, affirmed in the policy, and therefore according to the doctrine laid down in *Grant* vs. *the Ætna* "whether the engagement" (or, in this case, the fact affirmed), be material or not material, the insurers are discharged; that is, provided my view of the meaning of the policy be right. Under our law, it might perhaps be sufficient, if the fact affirmed in the policy were substantially true. (2) Whereas, the law of England requires the facts affirmed in a policy to be literally true. (3) But as the statement in the present case, as I view it, was not true, either literally or substantially, it is not necessary to determine whether in this respect there is any difference between our law and the law of England. On the part of Appellant, however, it is contended that the policy must be understood

(1) 1 Arnould, § 214, p. 584; 1 Phillips, No. 762, p. 430, and cases cited.

(2) Emérigon, chap. 6, sec. 3; Boulay Paty, Ed. of 1827, vol. 1, p. 163-4; Boudousquié, No. 108, p. 137.

(3) "The distinction according to English law between a warranty and a representation being, that a representation may be satisfied with a substantial and equitable compliance, whereas a warranty requires a strict and literal fulfilment, i. e., what it avers must be *literally true*, what it promises must be exactly performed."—Arnould, vol. 2, 587, and authorities there cited; 1st Phillips, § No. 762, page 430.

as meaning that the steamer was then in dock, and *intended to navigate*; but I agree with the learned Judge of the Superior Court in thinking that this view cannot be adopted. The description "The steamer Malakoff navigating the river St. "Lawrence, between Quebec and Hamilton, stopping at in- "termediate ports" is clear, and hardly, it seems to me, admits of two meanings and the words "now in Tate's Dock, Montreal," inserted parenthetically, cannot be allowed to negative or neutralize the sense of the main body of the sentence; they simply add a circumstance tending to identify the boat, and to establish where she happened to be when the description was given. As observed by Mr. Justice Badgley, the words "now in Tate's dock" in brackets are only incidental to the main action of the steamer, "navigating the St. Law- "rence and stopping at intermediate ports." I do not fail to bear in mind that the jurors have also found that the policy was not issued by Defendants, at a lower rate of premium than would have been exacted by Defendants, if they had known that the Malakoff was *not* navigating the St. Lawrence, but was *laid up* in Tate's Dock. But in my opinion that matter ought not to have been submitted to the jury. The policy shows the contract between the parties, and the construction of the contract is for the court, and not for the jury. It is, perhaps, true that the risk from fire may not be greater to a steamer in deck than to a steamer actually navigating, *if equal care be taken of the two.* But a vessel *employed* is generally a source of profit, whereas a vessel *lying idle*, is usually a cause of expense. And an Insurance Company might therefore reasonably presume that a boat yielding profit, would be more likely to be taken care of than a boat causing loss. But, be this as it may, by the policy, as I read it, Defendants insured a boat "navigating the St. Lawrence" whereas the boat, in truth, then was *not navigating the St-Lawrence*, but was laid up in dock, during, it is to be observed, the season of navigation. The main risk, according to the policy, was the risk incident to the *use* of the boat *on the river*, whereas the risk, in reality, was that caused by the boat then being *not in use*, and therefore *not on the river*. The Respondents, therefore, by the policy of Insurance, did not assume the risk to which Appellants attempts to subject them, and, consequently, they cannot be held liable. Before leaving this branch of the case, I may observe that, although Respondent has drawn our attention to the statements of the witnesses before the jury, I have not thought it right to advert to that proof, because, notwithstanding the changes in our law on this subject, I am of opinion that, on an application such as the present, we are bound by the finding of the jury, as to

any facts properly submitted to them. The object of the Legislature in requiring a special verdict to be returned, upon questions of fact defined by a judge was, I think, to prevent the jurors from encroaching upon the Province of the court; but there his nothing in the Statute to show that the Legislature intended to transfer the finding of the facts from the jury to the judge, which could not be done without subverting the system of trial by jury. I now pass to the consideration of a question which this case presents, and upon which, although argued in *Grant* vs. *Ætna Company*, the Lords of the Privy Council found it unnecessary to pronounce a decision, namely: Is it competent to a Defendant in a suit to move for judgment *non obstante veredicto?* On this subject, Archbold says: "It "seems that the Defendant cannot in any case obtain judg- "ment *non obstante verredicto*, however insufficient the Plain- "tiff's pleading may be and that his proper course is to move "in arrest of judgment." The only authority cited by Archbold in support of this doctrine is the case of Rand and Vaughan (1) in which Chief Justice Tindal, in adjudicating upon a motion made by a Defendant for judgment *non obstante veredicto*, said: "The motion should perhaps have been more correct in point of form, if it had been a motion to arrest the judgment for Plaintiff on the ground that enough still remains upon Defendant's special plea confessed by Plaintiff's replication, to bar Plaintiff's demand; for we are not aware that any instance can be produced where Defendant, after an issue which he has taken has been found against him, has been allowed to have judgment entered in his own favor, *non obstante*." Nine years afterwards, the case of Rand and Vaughan having been cited in the Exchequer-Chamber as showing that "Tindal, C. J., *thought* that a Defendant after verdict against him could not have judgment entered in his favor "*non obstante*." The learned Chief Justice observed "I said only that the court was not aware of any instance," 6th Adolphus and Ellis, N. S., 704. This much however is certain that, even in England, there are some cases in which a Defendant may move for judgment *non obstante veredicto*, for instance, in the case of the *Queen* vs. *The Governor of the Darlington Free Grammar school*, 6 Ad. and El. N. S., 682, which however, it is proper to observe, was a case of mandamus under the Statute 9 Anne, C. 20, Sec. 2. A verdict having been found for the crown, on all the issues, the Court of Queen's Bench gave judgment for the Defendants *non obstante veredicto*, and the judgment so given was afterwards affirmed in the Exchequer Chamber. That case as I have already observed

(1) Archbold, 1108.

was a case of *mandamus ;* but after carefully considering the report, I think that the reasons given, in that case, for allowing the Defendant to move for judgment in his favour, *non obstante veredicto* could *under our system* be urged by a Defendant in any ordinary case. Moreover it may be inferred from the observations made by Baron Parke, (now Lord Wensleydale) in the case just cited, that he did not admit the doctrine that a Defendant in an ordinary case could not make a motion such as that under consideration. At one stage of the argument, Baron Parke remarked : " If a plaintiff by a bad replication confesses, and does not avoid the matter pleaded, I cannot see why there should not be judgment *non obstante veredicto*, as well as where a Defendant makes a default in his plea." And in answer to the question put by Baron Parke : " Is there any authority for saying that (namely, the principle that where there is an express confession, but no avoidance, judgment shall be given for the opposite party) does not apply to the Plaintiff's as well as the Defendant's pleading? The counsel for the Plaintiff admitted no instance appears in which it has been so held." The observations of Baron Parke in the case just referred to are deserving of particular attention, not only on account of the great learning and experience of the judge by whom they were made, but also on account of the subject having been fully considered by him, in consequence of the questions submitted to the judges, by the House of Lords, some time previously in the case of *Gwynne* vs. *Burnell.* (1) It may also be observed that, in the course of the argument to which I have adverted, no observations opposed to the doctrine which Baron Parke seemed inclined to adopt, were made by any of the judges ; and, when the judgment was rendered, the Court pronounced no opinion upon the question, whether in ordinary actions the Defendant is entitled to a judgment in his favour *non obstante veredicto.* I may add that in the English reports up to 1861, within my reach, I have not found any case formally deciding the question under consideration. I therefore am inclined to think that the English practice, as to the right of a Defendant to a judgment *non obstante veredicto*, cannot be considered authoritatively settled ; whereas the Canadian practice has been settled by several judgments, and even if the English practice were certain, and well established, it would not, it is plain, be binding upon us, the systems of law, of pleading, and of procedure generally, in the two countries, being wholly different. Independently of the authority of decided cases, it appears to me that our Canadian practice upon this point is reasonable. In

(1) 6 Bingham, N. C. 453.

order to justify a Court in rendering judgment *non obstante veredicto*, two things must, it seems, concur: first, the facts established by the verdict must be insufficient to warrant a judgment in favor of the party obtaining the verdict; and, secondly, the record must show that facts have been confessed or admitted, which justify a judgment against the party in whose favor the verdict was rendered. When such is the state of the record, the Court may well treat as nugatory the verdict establishing the immaterial facts, and render judgment upon the material facts admitted or confessed. Under our system, the parties in a suit are upon a footing of exact equality; neither party, at any stage of the proceedings, is considered as exclusively *dominus litis;* and, therefore, as we hold that a Plaintiff, having in his favor an admission or confession of the material facts, is entitled to a judgment against the Defendant, although he may have obtained a verdict in his favor as to immaterial facts, we also hold, that where the Defendant has in his favor an admission or confession of facts establishing a good defence, he is entitled to judgment against the Plaintiff, although he may have a verdict in his favor upon facts that are unimportant. With reference to the case before us, I must say it appears to me questionable whether, considering all the answers of the jurors, and more particularly their answer to the 7th question, it was necessary to style the motion for judgment as being *non obstante veredicto;* but no objection has been raised to the form of the Defendant's motion, and I do not think it a matter of importance. Upon the whole, I view the case in the same light in which it appears to have been regarded by M. Justice BADGLEY, in the Superior Court, and therefore think the judgment appealed from ought to be confirmed.

MONDELET, Justice: It appears to me that the wording of the Policy of Insurance effected through George Tate, Plaintiff's agent, on the 5th August, 1858, to take effect one year from the 30th July previous, is so plainly expressed as to leave no doubt in the mind. The words are "on the hull and joiner work of the Steamer *Malakoff* (now in Tate's dock, Montreal) navigating the river St. Lawrence, between Quebec and Hamilton, stopping at the intermediate ports, including outfitting in the spring, two thousand four hundred dollars; on the engine therein, one thousand six hundred dollars, as per application No. 17,783." I shall abstain from making any lengthy remarks, which would be but a repetition of what has already been said by some of my brother Judges. It will suffice for me to observe, that if words are intended to be used for the purpose of conveying one's meaning, surely the words "navigating the river St. Lawrence" must

and do mean, that the steamer then in the dock, is not to remain there, but *is to be used* in navigating the river St. Lawrence. If the words do not mean that, then it must be said that they are used to convey the very reverse of their natural and grammatical meaning. As to the risk, it is manifest, not only from the evidence, but from the very nature of things, that a vessel in dock is, from the surrounding objects, in greater danger of fire, than when, in the course of navigation, proper precautions are taken against fire, day and night. Upon the whole, I am of opinion that Plaintiff had no right to call upon the Defendants for the payment of his insurance, he having by his non conforming to the policy and contrary to his declaration that the steamer was navigating the waters of the St. Lawrence, placed himself in a position such, that he must bear his loss and not the company. The judgment of the court below, should, therefore, be confirmed.

JUDGMENT: " The court having heard the parties, upon the motion of Defendant of the 18th day of April, 1863, that, inasmuch as there was and is in the policy of insurance declared upon an express condition and warranty that the steamer *Malakoff* was navigating, and did and should continue to navigate, the river St. Lawrence, between Quebec and Hamilton, stopping at the intermediate ports, to wit: during the seasons of navigation while the policy should remain in force, and it appears and is admitted, in and by the written admission of Plaintiff, that the condition and warranty was not complied with, and that, in fact, the steamer always remained in Tate's dock, and was not navigating, and did not navigate; and that, inasmuch as the evidence adduced at the trial proved material mis-representation and concealment by Plaintiff in his application for said policy, that, in consequence of the facts set forth in the said motion, and notwithstanding the verdict rendered by the jury in this cause in favor of Plaintiff, judgment be entered up in favor of Defendants, and, by such judgment, it be declared that the said policy, in consequence of such breach of the said condition and warranty, was and is null and void, and the same be set aside, and the action of Plaintiff be hence dismissed, with costs; considering that the declaration of Plaintiff in the said policy of insurance, and enunciated in the following words: " on the following property owned by assured, namely, on the hull and joiner work of the steamer *Malakoff* (now in Tate's dock, Montreal,) navigating the river St. Lawrence between Quebec and Hamilton, stopping at the intermediate ports, including outfitting in the spring," contains an express condition and warranty upon and for the steamer *Malakoff* mentioned in and insured by said policy, and was a condition of the policy to be kept and ob-

served; and considering that it is admitted by Plaintiff in and by his admissions filed, that the said condition and warranty was not complied with, and that the steamer was not navigating as aforesaid, and did not navigate at any time in and from the effecting of the insurance until the destruction thereof by fire, and always remained in Tate's dock; and further considering that the action and *demande* of Plaintiff was unfounded in law, doth, notwithstanding the said verdict, grant the motion of Defendants that the action of Plaintiff in this behalf be dismissed, with costs, and, in consequence, Plaintiff's action and *demande* is hence dismissed, with costs. (14 *D. T. B. C.*, p. 493 et 8 *J.*, p. 141.)

MACKAY and AUSTIN, for Appellant.

TORRANCE and MORRIS for Respondents.

FRAUDULENT ASSIGNMENT.—ATTACHMENT.

SUPERIOR COURT, Montreal, 30th April, 1863.

Coram SMITH, J.

MOLSONS BANK *vs.* LESLIE *et al.*, *and* LESLIE *et al.*, Tiers Saisis.

Leslie & Co., Merchants, became insolvent and made an assignment of their estate to three trustees, by a deed (23 February, 1860, John C. Griffin, N. P.) containing *inter alia* the following clauses: "That, upon a surrender of all their said assets to their creditors, the said assignors and each of them may obtain a discharge from their present liabilities. And it is hereby agreed, as a condition hereof, that any creditors of the said assignors who shall desire to have the benefit of the present assignment, and to receive his or their share of the proceeds of the said estate and assets, shall have the right so to do, provided always that, before any such creditor or creditors shall receive any dividend or sum of money whatsoever, he or they shall duly make and execute, in authentic form, a deed by which his or their acceptance of the terms of these presents, and, in consideration thereof, his or their discharge of the said assignors shall be fully and validly effected; and the proportion or share in such dividend or dividends of any creditor or creditors who shall refuse or neglect to execute such acceptance and discharge, shall be retained by the assignees or their assigns, subject to subsequent distribution as assets of the said estate, should such creditors persist in such refusal." Molsons Bank, creditors, thereupon, sued out a writ of *saisie-arrêt* before judgment against Leslie & Co., on the affidavit of William Sache, their cashier, that Leslie & Co. had secreted and were immediately about to secrete their estate, &c. (Revised Statutes, L. C., p. 96), relying upon the provisions of the deed of assignment as their justification for the attachment. Leslie & Co. attacked the truth and sufficiency of the allegations of the affidavit, by an exception *à la forme.*

Held: 1° That Leslie & Co. having become insolvent, their whole estate was the *gage* of the creditors.

2° That they could not do a single act whereby the rights or position of their creditors could be affected.

3° That the words of the statute did not simply mean "hiding:" that the French expression "détourner" came nearer it. Secreting meant

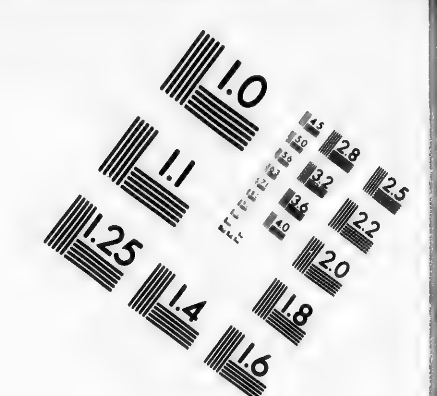
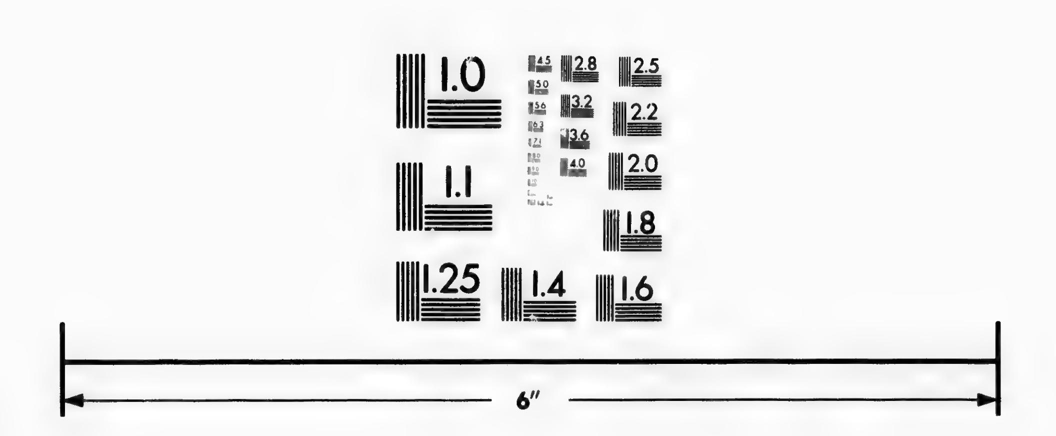


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placing property out of the reach of creditors to prevent them from getting their rights, making their position different from what the law made it.

4° That the conduct of Leslie & Co. in making such assignment was in law a fraud, and Molsons Bank were justified in suing out the attachment.

A preliminary proceeding in this case is reported 11 *R. J. R. Q.*, p. 77. Leslie & Co., merchants, became insolvent, and made an assignment of their estate to three trustees, by a deed (23rd February, 1860, C. Griffin, N. P.) containing *inter alia* the following clauses; "That upon a surrender of all their said assets to their creditors the said assignors and each of them may obtain a discharge from their liabilities, &c. And it is hereby agreed as a condition hereof, that any creditors of the said assignors who shall desire to have the benefit of the present assignment, and to receive his or their share of the proceeds of the said estate and assets, shall have the right so to do, provided always that before any such creditor or creditors shall receive any dividend or sum of money whatsoever, he or they shall duly make and execute in authentic form a deed by which his or their acceptance of the terms of these presents and in consideration thereof, his or their discharge of the said assignors shall be fully and validly effected; and the proportion or share in such dividend or dividends of any creditor or creditors who shall refuse or neglect to execute such acceptance and discharge, shall be retained by the said assignees or their assigns, subject to subsequent distribution as assets of the said estate, should such creditor or creditors persist in such refusal." Molsons Bank, creditors, thereupon sued out a writ of *saisie-arrêt* before judgment against Leslie & Co., on the affidavit of William Sache, their cashier, that Leslie & Co. had secreted and were immediately about to secrete their estate, &c. (Revised Statutes L. C., p. 96), relying chiefly upon the provisions of the deed of assignment as their justification for the attachment. Leslie & Co., attaked the truth and sufficient of the allegations of the affidavit, by an exception *à la forme*, denying that they had secreted or were secreting, &c., &c. The Plaintiff met the exception by an answer in law which was maintained in the Court below, but dismissed in appeal, (11 *R. J. R. Q.*, p. 77,) and by a second answer, whereby they alleged: "That the affidavit upon which the writ and process was issued is true, and all and every the allegations thereof, that William Sache was credibly informed, had every reason to believe and did verily and his conscience believe that Defendants had secreted and were immediately about to secrete their estate, debts and effects, with a view to defraud

their creditors and particularly the Plaintiffs; that Defendants were and had been for two months previous to the writ of attachment insolvent *en déconfiture*; that, after their open and declared insolvency, they made and executed, before Griffin and his colleague, Notaries Public, on the twenty-third day of February, 1860, a provisional assignment of all their estate, debts and effects, without the assent, advice or information of any of their creditors, and without any notice given to them, selecting for their assignees the Honorable James Leslie, their father, Alexander Maurice Delisle, and Henry Starnes, formerly a partner, jointly with the Defendants, and whom the creditors had every reason to suspect to be a debtor of Defendant in a large amount, and to have left the firm when insolvent; that, moreover, in and by the said deed of assignment, Defendants did impose generally upon all their creditors conditions contrary to law, in effect, exacting from them and each of them, before they should share or partake in the proceeds of the estate, so assigned, a full and complete discharge of all their respective claim, moreover, granting to the assignees the right and authority to settle and compromise a pretended claim of the wife of Patrick Leslie, one of Defendants, amounting to five thousand pounds, as they, the assignees might deem fit, and also requiring and exacting from all and every their creditors, the sanction, approbation, and authority to carry out such arrangement, and, in default of compliance thereto, denying them any right to share or participate in the proceeds of their estate; that Plaintiff, jointly with the other creditors of Defendants, by protest executed before Gibb, and his colleague Notaries Public, of the twenty-third of February last, did demand a full, complete and unconditional assignment from Defendants, which they refused; that, moreover, Defendants did, after their declared insolvency, during the month of February last, and during the two months previous to the institution of this action, sell and dispose of their real estate, to wit, of real estate of great value in Upper Canada and in Lower Canada in favor of their father, the Honorable James Leslie, at a price greatly under its value; that, by such facts, Defendants had illegally secreted, and were about immediately to secrete their estate, debts and effects, and Plaintiff was justified in law, and had a right to obtain the issuing of a writ or process of attachment against Defendants."

SMITH, J.: This was an action brought by Molsons Bank against Leslie & Co., to recover a large sum of money due by Defendants to the Bank, and for which a *saisie-arrêt* before judgment was issued on the 17th March, 1860, to attach Defendant's estate in the hands of the Hon. Jas. Leslie, Hen-

ry Starnes and A. M. Delisle, the provisional assignees. The Defendants pleaded an *exception à la forme*, alleging that there was no ground for the *saisie-arrêt*; that the allegations contained in the affidavit of Sache, the cashier of Molson Bank were untrue and unfounded. It was upon the evidence adduced on this point that the court was now called to give a decision. The allegations of Sache's affidavit were of the usual description, that he had reason to believe that Defendants, Leslie & Co., had secreted and were immediately about to secrete, their estate, debts, and effects, with intent to defraud their creditors, &c. Upon the truth or falsity of this pretension Plaintiff case must rest. We now come to the question, what is to be considered fraud and what description of circumstances must happen to entitle the Plaintiff to a *saisie-arrêt?* It was to be observed that the issue was general. The *exception à la forme* stated that the facts alleged in the affidavit were not true; Plaintiff replied that they were. The first and most important point for Plaintiff was this, that, shortly before the issuing the *saisie-arrêt*, Defendants, Leslie & Co., were in a state of utter insolvency. That they had made over, by what they called a provisional assignment, to James Leslie and Delisle and Starnes, the whole of their property. The creditors, not pleased with this provisional assignment, called upon Leslie & Co., to make an assignment of their property, general and equalized. The Defendants refused to do so, and then the *saisie-arrêt* was issued. Now, we must look to the condition of the firm, at the time of this demand. It was perfectly certain that they were in a state of insolvency at the date of the provisional assignment. It was stated in the deed that the assignment was made to prevent the estate from being wasted away by suits instituted by the creditors, and for the protection of the interests of the creditors generally. Full authority was given the assignees to collect the debts due to Leslie & Co., and to retain the estate till a number of liabilities for which Defendants were endorsers, should have matured, that the actual amount of their liabilities might be ascertained. Now came an important clause in the assignment, to the effect that the assignees should investigate the position of the firm, and submit a full report to the creditors of the amount of dividend the estate was likely to pay, and all other information they might be able to impart, the creditors to give Defendants a complete discharge from their liabilities. The proposition arising out of this statement amounted to this, that these men, in a state of insolvency, without any intimation to their creditors, assign over the whole of their estate to assignees, and that no one of the creditors shall be entitled to the benefit of the assign-

ment, unless he be willing, in the first place, to give them a general discharge. It was necessary to make a remark upon this. When the firm became insolvent, the whole estate became *gage* to the creditors. It was no longer in the power of the firm to do any act which affected the rights of the creditors in any respect, or which might alter the quality existing among them. Consider what a strange practice it would be, if it were permitted to a debtor to place his property in the hands of a third person, and say to his creditors, "I have placed my property there, and you will be permitted to participate in the benefit, provided you give me first a general discharge." It was a principle so wholly adverse to law, that a man should be entitled to dictate thus to his creditors, when the law declared that he should not even have power to do a single act affecting the creditors' rights or positions, that it seemed absurd to ennunciate such a proposition. Although, therefore, these gentlemen might have acted in good faith, and with a sincere desire to benefit their creditors, and prevent the estate from being frittered away, yet this clause in the assignment struck it with absolute nullity. The Defendants had, in fact, no more right to make this proposition than to say to their creditors, "Instead of getting twenty shillings in the £, we shall force you to take five shillings." It was said on behalf of Defendants, that the provisional assignment was made openly, and notified to the creditors, and, consequently, there could be no intention to conceal the fact from them. But this was merely playing with words. "Secreting," the word used in the Statute, did not mean simply "hiding." The French word "*detourner*" came nearer the meaning conveyed by it. It signified the placing of property out of reach of the creditors, to prevent them from getting their rights, and making their position different from what the law makes it. This was an act which the law could never look upon as legal. What facts did we find on investing the case? First that the estate was absolutely insolvent; secondly, it was admitted by the parties themselves, that, from the state of their books, it was utterly impossible to tell what position the insolvents were in; or what the estate would or could realize; thirdly, that there was no possibility of ascertaining the position of the estate till the books had been wound up; and that no balance had been struck from the time that Starnes had ceased to be a member of the firm; fourthly, a large deficiency was found in the estate; and, although the testimony of one of the witnesses subsequently shewed that part of this deficit had been accounted for, yet, the fact remained that the insolvent firm assigned their estate while a large deficiency appeared on the face of their state-

ment. It was under these circumstances that they now came up with their *exception à la forme,* contending that the allegations of Sache's affidavit were unfounded, because, as they alleged, there had been no fraud on their part. But his Honor had no hesitation in saying that the law characterized such conduct as fraudulent. The Statute simply required that fraud should have been committed in the eye of the law, though the parties might have had the very best intentions. It had been argued that this was not fraud, as Plaintiffs had a revocatory action, to bring back the property to the estate. But his Honor was of opinion that this action did not apply under the circumstances. The judgment rested upon the deed of assignment. This deprived the creditors of their right, and consequently, fell under the provisions of the statute, which constituted it fraud. The judgment of the Court would therefore dismiss the *exception à la forme,* with costs.

"The Court considering that Defendants have failed to establish the allegations of their *exception à la forme,* and that Plaintiffs have established that there was just and probable cause for the issuing of the *saisie-arrêt* in this cause, and the allegations in the affidavit on which the writ issued are true and founded in fact, doth reject and dismiss the *exception à la forme,* with costs. (8 *J.*, p. 8)

LAFLAMME, LAFLAMME and DALY, for Plaintiffs.

DORION, DORION and SÉNÉCAL, for Defendants.

PROCEDURE.—DECREE OF THE PRIVY COUNCIL.

QUEEN'S BENCH, Montreal, 7th December, 1863.

Coram HON. SIR L. H. LAFONTAINE, Bart., C. J., DUVAL, J., MONDELET, A. J., and MONK, J. *ad hoc.*

MAURICE CUVILLIER *et al.*, Defendants in court below, Appellants, *and* THE BANK OF BRITISH NORTH AMERICA, Plaintiff in the court below, Respondent.

Held : That a decree of Her Majesty in Her Privy Council, reversing a judgment of the court of Queen's Bench for Lower Canada, which had confirmed a judgment of the Superior Court for Lower Canada, dismissing an action therein brought and directing the Superior Court to enter up judgment for the Plaintiff, is inoperative, and a judgment entered up accordingly by such Superior Court will be reversed on appeal.

This was an appeal from a judgment rendered by the Superior Court, at Montreal, (Hon. Mr. Justice SMITH, presiding) on the 30th of September, 1861, granting the conclusions of a petition presented to that court by Respondent, on the 17th of September, 1861, the allegations of which petition were as

follows: "That, by the judgment rendered in this cause, on the thirtieth day of April, 1858, the declaration and action of your petitioner, so far as the Defendants, Angélique Cuvillier and Alexander M. Delisle, Mary Anne Cuvillier and George Burns Symes and Luce Cuvillier, were concerned, was dismissed with costs; that your petitioner appealed from said judgment to the Court of Queen's Bench for Lower Canada, sitting in and for the District of Montreal, and, by the judgment rendered by that court, on the first day of December 1859, the said judgment so rendered by this court was confirmed; that your petitioner, thereupon, appealed to Her Majesty in Her Privy Council, and, by the judgment and decree rendered and given on the sixteenth day of April now last past, and which has been duly recorded and registered in the registers of this court, Her Majesty, by and with the advice of Her Privy Council, ordered that the judgment of the Court of Queen's Bench of Lower Canada of the first December 1859, and the same was thereby reversed with costs, and that this court be, and the same was thereby directed to cause judgment to be entered for your petitioner accordingly the petition then concluded, that the court would be pleased to cause judgment to be entered accordingly in favor of Respondent, condemning Angélique Cuvillier, Mary Ann Cuvillier, and Luce Cuvillier, jointly and severally, to pay and satisfy to Respondent the sums of money, interest and costs claimed in and by Respondent's declaration in the said cause fyled. The following is a copy of Her Majesty's judgment and decree in the said petition: "AT THE COURT AT OSBORNE HOUSE, ISLE OF WIGHT, the 16th day of April, 1861, Present: The Queen's Most Excellent Majesty, His Royal Highness the Prince Consort, Lord President, Lord Chamberlain. Whereas, there was this day read, at the Board, a report from the Judicial Committee of the Privy Council dated the 6th of February, 1861, in the words following, viz: "Your Majesty having been pleased, by your general order in council of the 29th November, 1859, to refer unto this committee a humble appeal from the Court of Queen's Bench of Lower Canada, between the Bank of British North America, Appellants, and Angélique Cuvillier and Alexander Maurice Delisle, Mary Ann Cuvillier, and George Burns Symes and Luce Cuvillier, Respondents, and likewise a humble petition of the Bank of British North America of St. Helens Place, in the city of London, setting forth that a suit was lately instituted in your Majesty's Superior Court for the District of Montreal, in the Province of Lower Canada, by Appellants, against Angélique Cuvillier and Alexander Maurice Delisle, Mary Ann Cuvillier, and George Burns Symes and Luce Cuvillier, together with Maurice Cuvillier, and

Marie Claire Perrault, for the recovery of the sum of £4107, 12, being the amount of seven several bills of exchange and a certain promissory note, and the damages and costs for the non-payment thereof respectively, together with interest thereon respectively upon and by virtue of a certain notarial deed dated the 26th day of July, 1849 ; that, on the 30th day of June, 1855, Marie Claire Perrault, Angelique Cuvillier, Alexander Maurice Delisle, Mary Anne Cuvillier, and George Burns Symes and Luce Cuvillier pleaded *exceptions péremptoires* and *défenses en fait* to the Plaintiff's said demand, that Marie Claire Perrault departed this life on the 23rd day of October, 1855, whereby and by acts thereon granted she ceased to be a party to this suit ; that Maurice Cuvillier, on the 21st day of September, 1857, confessed judgment in favor of Plaintiffs ; that, on the 30th day of April, 1858, the Superior Court gave judgment in favor of Respondents, Angelique Cuvillier, Alexander Maurice Delisle, Mary Ann Cuvillier, and George Burns Symes and Luce Cuvillier, but gave judgment against Maurice Cuvillier ; that Appellants appealed from the judgment of the Superior Court to the Court of Queen's Bench of Lower Canada, and, on the first day of December, 1859, the Court of Queen's Bench gave judgment affirming the judgment of the Superior Court, the Honorable Mr. Justice AYLWIN dissenting ; that Appellants feeling themselves aggrieved by the said judgment and being advised that the same was unjust and erroneous, craved leave to appeal therefrom to your Majesty in Council, and that such leave was accordingly granted to Appellants upon the usual terms, with which Appellants have duly complied, and humbly praying your Majesty that the said judgment may be reversed, varied or altered or for other relief in the premises. The lords of the committee, in obedience to your Majesty's said general order of reference have taken the said humble appeal and petition into consideration, and having heard Counsel on both sides, their Lordships do agree humbly to report to your Majesty, as their opinion, that the judgment of the Court of Queen's Bench of Lower Canada of the 1st December, 1859, ought to be reversed, and that the Superior Court for the District of Montreal (Lower Canada) ought to be directed to cause judgment to be entered for Appellants (Plaintiffs in the original suit) accordingly ; And, in case your Majesty should be pleased to approve of this Report, and to order as is herein recommended, then their lordships do direct that there be paid by Respondents to Appellants the sum of £283,16,6 sterling for the costs of this appeal." Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that

the judgment of the Court of Queen's Bench of Lower Canada of the 1st December, 1859, be and the same is hereby reversed, £283,16,6 sterling, costs, and that the Superior Court for the District of Montreal (Lower Canada) be, and the same is hereby directed to cause judgment to be entered for Appellants (Plaintiffs in the original suit) accordingly, whereof the Governor General, Lieutenant Governor or Commander in Chief of the Province of Canada for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly. (Signed) ARTHUR HELPS. The following is the judgment rendered by the Superior Court, on the petition so presented by the Respondent: "The Court, having heard the parties, upon the petition of Plaintiff, presented to this Court on the 17th day of September, 1861, praying that this Court cause judgment to be entered up in this cause in favor of petitioner, the Plaintiff in this cause, in accordance with the judgment or decree of Her Majesty in Her Privy Council rendered and given on the 16th day of April, 1861, having seen and examined the judgment mentioned and set forth in the said petition, and more particularly the judgment order or decree of Her Majesty in Her Privy Council of the 16th day of April, 1861, and duly enregistered in the registers of this Court, whereby the judgment of the Court of Queen's Bench for Lower Canada of the first day of December, 1859, was reversed with costs, taxed at £283,16,6 sterling money of Great Britain, equal to £345,6,5 current money of this Province, and this Court was thereby directed to cause judgment to be entered for petitioner, Plaintiff in the original suit; accordingly, doth grant the said petition, and, in consequence, the court now here doth order judgment te be entered up accordingly in this cause in favor of Plaintiff and petitioner, and doth adjudge and condemn Defendants Angelique Cuvillier, Mary Ann Cuvillier and Luce Cuvillier, jointly and severally, to pay and satisfy to Plaintiff the sum of £4,107,12 current money of this Province of Canada, for the causes, matters, and things in the Plaintiff's declaration stated, with interest on £625, from the 31st day of October, 1854, on £625, from the 4th day of November, 1854, on £625, from the 6th day of November, 1854, on £750, from the eighth day of November, 1854, on £400, from the 16th day of November, 1854, on £400, from th 25th day of November, 1854, on £450, from the sixth day of December, 1854, and on £176,14,6, from the 11th day of January, 1855, and on £55, 17,6, from the ninth day of March, 1855, date of the service

of process in this cause, until actual payment, and costs of suit." (1)

Abbott, for Appellants: The questions which arise on this appeal are: 1st. Whether or no the Superior Court, having rendered a final judgment in a cause, has any right to take up the same cause, and render a different judgment in it. 2nd. If it can, whether it can exercise that right before the first judgment has been formally reversed by the final Court of Appeal. The Superior Court pronounced a judgment in this cause, on the 30th April, 1858, dismissing Respondents action against Appellants. On the 1st December, 1859, that judgment was confirmed by this court. On the 16th April, 1861, Her Majesty in Her Privy Council ordered: "That the judg-" ment of the Court of Queen's Bench, of the 1st December, " 1859, be, and the same is hereby reversed with £283,16,6 " sterling, costs; and that the Superior Court for the District " of Montreal be and the same is hereby directed to cause " judgment to be entered for Appellants." On the 17th September, 1861, Respondents presented a petition to the Superior Court, at Montreal, praying that court to cause judgment to be entered up for Respondents, condemning Appellants, jointly and severally, to pay and satisfy to the Respondents the sum of £4.107,12 and interest, and judgment was accordingly rendered by that court, on the 30th September, 1861, granting the prayer of the petition and pronouncing a formal and final judgment against Appellants according to the conclusions of the petition. It is from this judgment Appellants have appealed, and they rely upon the following grounds in support of their appeal: 1. That the order in council does not reverse the final judgment rendered in the Superior Court, on the 30th April, 1858, but only the judgment of this court rendered on the 1st December, 1859, and that first mentioned judgment still subsisted when the judgment now appealed from was rendered, and, in fact, still subsists. 2. That, by the final judgment rendered in the said cause in the court below, on the 30th April, 1858, that court was disseized of the contestation and had no jurisdiction to render any second or other final judgment therein. And that, if the privy council were of opinion that the judgment of the Superior Court was erroneous, they could only give effect to that opinion by setting aside the judgment, and pronouncing the judgment which, in their opinion, the court below should have rendered. The Appellants believe that the first of these grounds of objection is true in point of fact, and that the

(1) Les remarques du juge Smith en rendant ce jugement sont rapportées dans 10 R. J. R. Q., p. 22.

second is equally well founded in law. They are advised that the courts of this country have hitherto preserved the right of expressing their own opinions upon every subject that has been litigated before them, and have never yet permitted themselves to be made the mere registrars of the decrees of other tribunals. And, as Appellants are aggrieved by the order in question, as it has been construed by the court below, they conceive, with all du respect to the august tribunal which entertains a different view of our law from both of our highest courts, that they are entitled, at least, to a clear, distinct, and unmistakeable expression of that view, and of the judgnent which, in the opinion of the court of last resort, the court below ought to have rendered. That this is not afforded by the order of the 16th April, 1861, is rendered apparent by the fact that it would have satisfied that order to have " entered judgment for Plaintiff " upon any one of the numerous contracts set up in Plaintiff's declaration, as fully as to have entered up judgment upon them all. If this honorable court should sustain the views of Appellants, they will be afforded an opportunity of showing before Her Majesty in her privy council the points upon which, as they humbly conceive. Her Majesty has been erroneously advised. And, as Appellants believe that the law of this country fully bears out their pretensions, they respectfully urged upon this honorable court the reversal of the judgment of the court below.

BETHUNE, for Respondent, submitted : That the honorable judge who pronounced the judgment now appealed from is the same judge who pronounced the original judgment which gave rise eventually to the appeal to Her Majesty in her privy council. It was urged, at the argument on the petition, by Appellants' counsel, that a compliance with the mandate contained in Her Majesty's decree would amount, in effect, to a reversal by the honorable judge of his own judgment, but, considering the decree to be a virtual reversal in itself of that judgment, andthat, sitting as he was in Her Majesty's own court, as her ministerial agent or representative, administering justice in her name, he could not refuse to obey the order contained in Her Majesty's decree. The honorable judge, therefore, has no hesitation in entering up judgment accordingly in favor of Respondent, and Respondent confidently trusts, that this honorable court will have less hesitation in declining to interfere with his action in that behalf.

LAFONTAINE, juge en chef : Une question presqu'en tout semblable à celle sur laquelle cette cour a eu à se prononcer, le 3 septembre 1860, dans la cause de l'*Assurance de Montréal,* contre *McGillivray*, se présente sur cet appel. Dans la

cause de l'*Assurance de Montréal* et *McGillivray*, (1) la même question s'est présenté et j'ai là exprimé mon opinion. Je persiste respectueusement dans cette opinion qui semble avoir été trouvée exacte par le conseil privé, car cet honorable tribunal a, le 8 février 1831, modifié ou changé son premier rapport, L'on voit que, par le décret dont il s'agit ici, le jugement de cette cour (Cour du Banc de la Reine) a bien été infirmé, et nous devions donner aux parties *acte* de ce dispositif du décret ; mais premier jugement de M. le juge SMITH, celui du 30 avril 1856, n'a pas été infirmé. Le décret dit seulement à la Cour Supérieure d'entrer le jugement pour les Demandeurs. Mais quel doit être ce jugement ? Le décret ne le dit pas. Sera-ce pour le capital en entier, ou seulement pour une partie ? Sera-ce pour le capital seulement, ou pour le capital et les intérêts. Sera-ce enfin pour les intérêts seulement, sur tous les titres de créance, ou seulement sur partie des titres ? Le décret n'en dit rien. Le fait est que, dans notre système, le juge *à quo*, quand il y a appel à un tribunal supérieur, n'est plus saisi de la cause, et ne peut pas être appelé à infirmer son propre jugement. C'est au tribunal d'appel à l'infirmer, s'il y a lieu, et, alors, son jugement, étant celui que la Cour de première instance aurait dû rendre, est envoyé avec le dossier à la dite cour, pour y être

(1) Dans la cause de l'*Assurance de Montréal* et *McGillivray*, la Cour du Banc de la Reine (LAFONTAINE J. en C., AYLWIN, J., dissident, DUVAL, J. et CARON, J.), 6 juillet 1867. confirma leur jugement rendu le 30 avril 1856 par la Cour Supérieure, (SMITH, J.,) et le jury en faveur de l'Intimée. Sur appel le Conseil Privé, le 23 janvier 1860, rendit un décret portant purement et simplement que le jugement de la Cour du Banc de la Reine était infirmé. Le 1er juin 1860, l'Appelante présenta deux motions ; la première demandant qu'il lui soit donné acte de la production de copie du décret du Conseil Privé, que cette copie soit enregistrée et que le dossier ne soit pas transmis à la cour de première instance avant que d'autres procédés et jugement ultérieurs aient eu lieu devant ce tribunal, suivant que la justice, la loi et l'état de la procédure peuvent l'exiger ; la seconde motion concluait ce que la Cour du Banc de la Reine procédât à rendre le jugement que la cour de première instance aurait dû rendre en ordonnant et adjugeant que l'Intimée soit débutée de son action. Le 3 septembre 1860, la Cour du Banc de la Reine (LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., et MONDELET, J.) a jugé que, par l'appel à Sa Majesté en conseil du jugement final de cette cour, ce dernier tribunal se trouvait dessaisi de la cause ; qu'un décret de Sa Majesté en conseil, infirmant purement et simplement un jugement de cette cour confirmant le jugement dont était appel, sans indiquer dans quel sens le jugement aurait dû être rendu, ne peut saisir de nouveau cette cour qui, ignorant les motifs qui ont pu déterminer les membres du Conseil Privé, est dans l'impossibilité de rendre un autre jugement ; et a accordé la première partie de la première motion de l'Appelante lui donnant acte de la production de copie du décret de Sa Majesté en Conseil et ordonnant qu'entrée en soit faite sur les régistres de cette cour, mais a rejeté l'autre partie de cette motion ainsi que la seconde motion en entier. Sur requête à Sa Majesté en conseil, le décret du 25 janvier 1860 fut modifié en y ajoutant que le jugement de la Cour Supérieure du 30 avril 1856 était aussi infirmé et le verdict rendu cassé, et la cause renvoyé à la Cour Supérieure avec instruction à cette cour d'émettre un *venire facias de novo*. (4 R.J.R.Q., p. 450 et 455.)

exécuté. Il en est de même de notre Cour en Appel (Cour du Banc de la Reine.) Quand il y a appel de notre jugement au conseil privé, nous ne sommes plus saisis de la cause. S'il est infirmé par le conseil privé, nous devons obéir respectueusement, comme nous le faisons toujours, au jugement que rend le conseil, que nous renvoyons ensuite au Tribunal de première instance, pour que là il reçoive son exécution, suivant son dispositif et le cours ordinaire de la loi. Ainsi donc, quand il y a appel successif d'un jugement de la dite Cour Supérieure, d'abord à cette Cour, puis à Sa Majesté en Conseil, c'est au décrêt qui prononce en dernier ressort à dire quel jugement aurait dû être rendu par la dite Cour Supérieure, en un mot, c'est le décret de Sa Majesté en Conseil qui doit énoncer le jugement même, et son dispositif. Pour nous, nous n'avons plus, dans ce cas, qu'à l'exécuter, ou plutôt à le faire exécuter par la Cour Supérieure, même quoique nous puissions ne pas l'approuver. De la part de la Banque, l'on nous a dit qu'il n'y avait qu'un défaut de forme. Il y a plus que cela ; nous sommes sans jugement que nous puissions faire exécuter. Mais n'y eût-il qu'un défaut de forme, cela serait encore très-important, en ce qui regarde le maintien, dans un ordre régulier de la hiérarchie des tribunaux. Sur le tout, ainsi que je l'ai déjà fait dans la cause de l'*Assurance* et *McGillivray*, "je " dois respectueusement exprimer mon opinion que le décret " dont il s'agit n'a pas été assez loin, qu'il aurait dû prononcer " le jugement qui, selon l'avis du conseil, aurait du être rendu " par la Cour de première instance (Cour Supérieure)," et que, par conséquent, dans l'état de la procédure, M. le Juge SMITH a outrepassé ses pouvoirs en procédant comme il l'a fait, en infirmant son propre jugement, et en prononçant un jugement que n'avaient prononcé ni cette Cour, lorsqu'elle était saisie de la cause au mérite, ni le Conseil Privé de Sa Majesté. Il n'avait plus qu'à exécuter, et cependant il se trouve qu'il n'avait encore rien qu'il pût exécuter.

MONDELET, A. J.: This Court had confirmed the judgment of the Superior Court which dismissed Respondent's action. An appeal was instituted to the Privy Council, by whom the judgment of this Court was reversed, but the judgment of the Superior Court remained untouched. The Superior Court was directed to enter judgment in favor of Respondent. Judge SMITH, upon a petition to that end, so entered a judgment in favor of Respondent. An appeal is now had to this Court of the latter judgment of the Superior Court. It appears to me that the Superior Court had no power to enter such a judgment 1° That Court was *functu officio* after the rendering of the first judgment dismissing Respondent's action. 2° By entering such a judgment it has *de facto* assumed an appelate

jurisdiction, and reversed its own judgment, rendering one *toto cœlo* different from and contrary to the first. Besides the Privy Council may, as it has done, reverse the judgment of this Court, and might have (but forgot it) reversed the judgment of the Superior Court, which this Court had confirmed. As to the Privy Council ordering or directing the Superior Court of Lower Canada, with which it has nor can have no *direct* communication and of course no order to give to it, to render such or such judgment, it is out of the question. The Superior Court should have plainly said that it had no power to do so. It follows therefore that the judgment of the Superior Court, which is now appealed from, must be reversed. The following is the judgment rendered by the Court of Queen's Bench : " La Cour, considérant que, dans la Cour Supérieure (Cour de première instance), l'action de la Banque (présente intimée) a été déboutée par jugement rendu le 30 avril 1858, par l'Honorable James Smith, un des juges de la dite Cour ; que, sur appel du dit jugement à cette Cour, le dit jugement a été, le 1er décembre 1859, confirmé, purement et simplement ; que, de ce moment là, cette Cour a cessé d'être saisie de l'instance et n'a plus pouvoir de s'occuper du mérite de la cause ; que Sa Majesté en Conseil a été saisie de l'instance, par l'appel interjeté du jugement rendu par cette Cour, le 1er décembre 1859 : Considérant que le décret dont il s'agit, et qui consiste dans un rapport du comité judiciaire du Conseil Privé, approuvé par Sa Majesté en Conseil, le 16e jour d'avril, 1861, infirme purement et simplement le jugement rendu par cette Cour le 1er décembre 1859, sans néanmoins prononcer le jugement qui, dans la pensée du comité judiciaire, aurait dû être prononcé par la Cour Supérieure siégeant à Montréal (Cour de première instance) et sans même exprimer d'opinion à cet égard, se contentant seulement de dire à la Cour Supérieure d'entrer jugement pour les Demandeurs, mais sans spécifier en même temps quel devra être ce jugement ; considérant que, dans le système de lois que nous avons à administrer, le tribunal, dont il y a appel à un tribunal supérieur, n'est plus saisi de la cause, et ne peut pas être appelé à infirmer son propre jugement au mérite ; que c'est au tribunal d'appel à l'infirmer, s'il y a lieu, et de plus à prononcer en même temps le jugement qui, dans l'opinion du dit tribunal, aurait dû être rendu par le tribunal de première instance ; qu'au pareil cas, le décrêt de Sa Majesté en Conseil est envoyé, pour son exécution, à la présente Cour d'Appel, qui voit alors à ce qu'il soit exécuté par la Cour Supérieure (Cour de première instance) ; considérant que la Cour Supérieure a, par son jugement du 30 septembre, 1861, duquel jugement il y a maintenant appel à cette Cour, infirmé son premier juge-

ment du 30 avril 1858, en rendant un jugement tout différent à ce dernier, ce que la Cour Supérieure n'aurait pas dû faire, devant, au contraire, s'abstenir d'infirmer elle-même son propre jugement au mérite, sauf à la partie qui lui avait présenté requête à cet effet, à interjeter appel de sa décision à cette Cour, et de là à Sa Majesté en Conseil; et qu'en agissant ainsi, la Cour Supérieure a agi contrairement aux lois du Bas Canada, et que, par conséquent, il y a lieu d'infirmer le susdit jugement du 30 septembre 1861 ; infirme, &c. (1) (8 *J.*, p. 21.)

ABBOTT and DORMAN, for Appellants.

BETHUNE and DUNKIN, for Respondent.

VENTE.—CRAINTE DE TROUBLE.

COUR SUPÉRIEURE, St. Hyacinthe, 28 novembre 1863.

Coram SICOTTE, J.

MERRILL *vs.* HALARY.

Jugé : Que l'acquéreur de biens immeubles, par contrat antérieur au statut 23 Victoria, chap. 59, peut, s'il est troublé ou a de fortes raisons de craindre d'être troublé par action hypothécaire ou en revendication, retarder le paiement du prix d'achat, jusqu'à ce que le vendeur ait fait cesser ce trouble, tout comme s'il était acquéreur en vertu d'un contrat postérieur à cette loi. (2)

PER CURIAM : Le Demandeur réclame le prix de vente d'un immeuble vendu le 7 juillet 1857. Le Défendeur plaide qu'il a juste sujet de craindre d'être troublé par des actions hypothécaires ou en revendication, à raison des droits acquis sur l'héritage, au profit des vendeurs du Demandeur, et dont le contrat de vente a été enregistré pour la conservation de leur privilége et hypothèque de bailleurs de fonds. Le Demandeur par ses réponses attaque le droit du Défendeur à faire valoir ce moyen, parce que le statut, chap. 59, 23 Victoria, n'a pas d'effet rétroactif et ne peut s'appliquer aux contrats de vente passés avant le 19 mai 1860. Quelle était la loi sur la vente, avant 1860 ? Le vendeur devait livrer la chose vendue et garantir l'acquéreur dans sa possession et contre tous troubles. L'acquéreur devait payer le prix convenu ; et, à défaut du paiement, le vendeur pouvait revendiquer la chose vendue comme étant encore la sienne ; le contrat de vente n'étant parfait que par la livraison de la part du vendeur et par le paiement de la part de l'acquéreur. La loi de 1860 n'a pas abrogé ces dispositions. Il y avait, avant 1860, une jurispru-

(1) *Vide* 6 *R. J. R. Q.*, p. 420, for Report of the case in the Privy Council.

(2) V. art. 1535 C. C.

dence, qui était loin d'être uniforme et universelle, appuyée sur l'opinion imposante de Pothier, qui allait à établir que l'acquéreur ne pouvait refuser le paiement, à raison de la seule crainte d'éviction ou de troubles qui pourraient surgir par l'exercice de droits hypothécaires, et qu'il fallait un trouble constaté par poursuite judiciaire pour permettre à l'acquéreur de refuser le prix. Pothier ne cite qu'un arrêt rendu en 1669, qui avait ainsi jugé. Cette opinion, qu'on prétendait fonder sur le droit romain, si propre par ses subtilités à permettre différentes conclusions, n'était pas acceptée par tous les jurisconsultes; et c'est dans les textes mêmes des lois romaines que l'on cherchait la preuve que cette opinion était contraire à la loi et à la jurisprudence romaines. Car la loi romaine bâsait le droit à la propriété, non pas sur la convention, mais sur la tradition. Le contrat, la convention seule, ne faisait pas acquérir le domaine; il fallait qu'il y eût tradition. Cette doctrine de la nécessité de la tradition prévalut en France, dans les pays de droit écrit, mais non dans les pays coutumiers, mais non dans la coutume et vicomté de Paris. Cela fut jugé dans ce sens, en 1726, par le parlement. DeGrainville, qui rapporte cet arrêt, dit : "La question paraît considérable, parce que l'autorité des auteurs paraissait contraire à des principes d'équité, qui fesaient une grande impression. Nonobstant ces autorités, on a décidé que la loi "Quoties" n'en était point une dans la *Coutume de Paris.*" Cette loi était dans ces termes : *Quoties duobus in solidum prædium jure distrahitur, manifesti juris est, cum cui priori traditum est in detinendo dominio esse potiorem.* La loi "Quoties" n'est pas reçue en Canada. Ainsi jugé, en appel, en 1836, dans la cause de *Bowen* vs. *Ayer (1)*, et en Cour Supérieure, dans *Dusseau* vs. *Daigneault* Cette nécessité de la tradition, que le code français a rejeté, et que notre jurisprudence a également réprouvée, est la base de l'opinion de Pothier sur l'exécution du contrat de vente, et il est important de constater ce fait pour bien comprendre les divergences d'opinions sur une autre sorte du même contrat et sur d'autres textes de la loi sur le même sujet. Avant 1860, l'acquéreur pouvait-il refuser le prix, avant qu'il y eût trouble ? Domat, liv. 1, tom. 2, sec. 3, n° 11, enseigne que : "si l'acquéreur découvre, avant le paiement, qu'il soit en péril d'éviction, et s'il le fait voir, il

(1) La loi "Quoties" n'était pas reçue en France dans les pays coutumiers, et la prise de possession n'y était pas nécessaire pour assurer à un acquéreur la propriété d'un héritage acquis par un contrat de vente contre un autre acquéreur du même héritage ; c'est aussi la règle de droit dans le Bas-Canada. La vente du shérif, faite dans le but de frauder le véritable propriétaire du terrain vendu, est nulle. (*Bowen* et *Ayer*, Cour d'Appel, Québec, 18 novembre 1836, SEWELL, juge en chef, SMITH, STEWART, COCHRAN et HENEY, juges, confirmant le jugement de la cour de première instance, 2 *R. J. R. Q.*, p. 164.)

ne pourra être obligé de payer le prix qu'après qu'il aura été pourvu à sa sûreté." C'est à Domat que les rédacteurs de code ont emprunté une disposition analogue à celle que nous avons écrite en 1860. Bourjon, vol. 1, p. 477, n° 10, dit : " Lorsqu'il y a péril d'éviction et que le péril est juridiquement prouvé, le prix, quoique échu, ne peut être exigé. Cette suspension de paiement est fondée sur une souveraine équité." Au n° 12, " découverte faite par l'acquéreur que l'héritage est sujet à un douaire coutumier, suspend l'exigibilité de moitié du prix ; c'est vente d'autrui," dit Bourjon, " ce qui est bien suffisant pour fonder la proposition." Cette seconde citation de Bourjon fait voir que, par les mots " juridiquement prouvé," cet auteur n'entendait pas parler de poursuites judiciaires. Il est important de rappeler que Domat et Bourjon se fondaient sur le droit romain qui voulait que " *ante pretium solutum, domini questione motâ, pretium emptor solvere non cogitur, nisi fidejussores idonei a venditore ejus evictionis offerantur.*" Sous l'empire des lois romaines, qui étaient la base de l'ancienne législation ou plutôt de l'ancienne jurisprudence, la seule crainte d'éviction, si elle était prouvée, avait un fondement réel suffisant, pour que l'acquéreur ne pût être tenu de payer son prix, sans caution, même à l'égard des créanciers indiqués par le contrat pour recevoir le prix. Celui qui achète veut acquérir un héritage et non des procès, dit Dénisart, en déclarant que celui qui avait acquis un héritage grevé de substitution pouvait faire résilier et annuler son acquisition : et il cite un arrêt qui l'avait ainsi jugé. La loi de 1860 a-t-elle introduit un droit, un principe nouveau, en statuant que, si l'acquéreur de biens immeubles est troublé ou a de fortes raisons de craindre qu'il sera troublé par quelque action hypothécaire ou en revendication, il aura droit de retarder le paiement du prix d'achat jusqu'à ce que le vendeur ait fait cesser ce trouble, à moins que le vendeur n'aime mieux donner cautionnement ou à moins qu'il ne soit stipulé au contrat de vente que l'acquéreur paiera nonobstant tel trouble ou crainte de tel trouble ? Cette loi ne change certainement rien à l'ancienne jurisprudence, quant au péril d'éviction pouvant surgir de l'action en revendication, telle qu'enseignée par Pothier, par Bourjon, dans le cas de la vente du bien d'autrui ou du douaire coutumier. Si elle n'est pas conforme à l'arrêt isolé de 1669, elle est en tout point conforme à l'esprit comme à la lettre du droit romain. Cette loi n'a fait que proclamer des règles admises précédemment, comme raison écrite ; et vu le conflit d'opinions qui pouvait exister, non pas sur le droit, mais sur l'exercice de ce droit, n'a fait que formuler une disposition conservant d'une manière plus précise une règle découlant du principe essentiel à la vente et reconnue dans

tous les temps : celui de livrer la chose vendue et de maintenir l'acquéreur dans sa possession. Le principe de la rétroactivité n'est pas applicable, parce que le produit de cette loi n'a pas soumis le passé à son empire, même en supposant qu'elle fût introductive, sinon d'un droit nouveau, mais au moins d'un procédé nouveau relativement au remède que l'acquéreur pourrait à l'avenir employer pour être protégé dans sa possession. Ce n'est pas le contrat qui est attaqué ou modifié, dans ses effets essentiels et dans les causes inhérentes au contrat, mais ce sont seulement les suites du contrat qui sont réglementées. La nécessité de payer à temps convenu n'a pas été modifiée, mais si quelque chose a été modifié, c'est seulement l'exercice du droit de se faire payer. Or, il est justement enseigné par Merlin, *Rép. jur.*, vbo. *Effet rétroactif*, " que ce n'est pas rétroagir que de subordonner à l'avenir l'exercice de droits résultant de lois antérieures, à telles formalités, à telles diligences, à telles conditions qu'il plaît à la loi nouvelle d'imposer." Ainsi l'intérêt conventionnel de l'argent, fixé par une loi antérieure, est exigible d'après le taux permis par cette loi. Mais une législation nouvelle peut dire au créancier : " Tu te feras payer dans tel délai, sinon la prescription de deux ans sera accordée contre les intérêts, quoique la loi, sous l'empire de laquelle le prêt fut fait, ne permettait de prescrire qu'après trente ans." Ainsi on a jugé que le rachat d'une rente constituée, faute par le débiteur de servir les intérêts durant deux ans, devait être réglé, non pas d'après l'ancienne législation, qui voulait que le rachat fût toujours à la volonté du débiteur, mais d'après le code qui a innové, mais sans rétroagir sur le contrat même, en modifiant seulement les suites du contrat, en décrétant que le débiteur d'une rente constituée en perpétuel peut être contraint au rachat, s'il cesse de remplir ses obligations pendant deux ans. Ainsi jugé, que dans le cas d'un bail consenti sous une loi de 1791, qui n'admettait pas la tacite reconduction, et dont l'expiration est arrivée sous le code, le fermier a pu continuer l'occupation par tacite reconduction, en vertu, non du bail, mais des dispositions nouvelles du code, qui permet la tacite reconduction. La vraie maxime est, que les lois qui interviennent pour garantir l'exécution des conventions, sont applicables du jour de leur sanction à toutes les infractions, à toutes les causes de tort ou d'injustice, qu'elles ont pour objet de prévenir ou de réprimer ; et cela, sans distinction de la date des contrats qui contiennent ces conventions ; autrement, on verrait l'étrange anomalie du concours indéfini, et durant des siècles, de deux législations différentes sur l'exécution d'un même genre de contrat. Notre régime hypothécaire fut profondément modifié par la loi sur la publicité des hypo-

thèques. Cette loi, faite dans le but de protéger les acquéreurs et les créanciers contre les troubles et contre les fraudes, a bien introduit un nouveau système, mais elle n'a pas pu abolir, et elle n'a pas aboli les hypothèques constituées suivant l'ancien mode ; mais, dans l'intérêt général, elle a fort bien dit aux créanciers, et sans rétroagir ; vous ferez inscrire vos hypothèques dans telle forme, dans tel délai, sinon vous serez déchus. Notre loi de 1860 est presque dans les termes de l'article du code français. Ce dispositif de notre régime hypothécaire, n'étant que pour garantir l'exécution des conventions et assurer les justes droits de chaque partie dans l'accomplissement et dans les suites du contrat, ne soumet pas le passé, mais seulement l'avenir, à l'empire de la loi, et n'a pas d'effet rétroactif. C'est au tribunal à décider s'il y a juste sujet de crainte de la part de l'acquéreur, quand la question sera soumise plus tard. Aujourd'hui il n'y a qu'à prononcer sur la réponse en droit du Demandeur à la première exception du Défendeur ; et, pour les raisons qui viennent d'être indiquées, la cour déclare cette réponse en droit mal fondée et la déboute avec dépens. Réponse en droit renvoyée. (8 *J.*, p. 38.)

BOURGEOIS et BACHAND, pour le Demandeur.

R. E. FONTAINE, pour le Défendeur.

WITNESS.—CONTEMPT OF COURT.

SUPERIOR COURT, Montreal, 31st October, 1863.

Coram BERTHELOT, J.

JOSEPH *vs.* JOSEPH.

Held : That on an application for imprisonment of a witness resident in Montreal, for contempt, in not obeying a *subpœna* personally served, it is not necessary to prove the service of the *subpœna* by affidavit, nor that the original writ was exhibited to the witness, nor that tender was made of fees or expenses. (1)

This was a rule against Defendant who resided in the city, and had been personally served with a *subpœna*, but failed to attend, to show cause why he should not be committed for contempt. DORMAN, showing cause, contended that the application was defective, for want of proof, by affidavit, that service of the subpœna had been personally made, that the original had been exhibited, and that tender of fees or expenses had been made, and cited in support, 2nd Taylor, on Evidence, §1142-1124, *Garden* vs. *Cresswell* ; 2nd *Meeson* and *Welsby*,

(1) V. art. 249 C. P. C.

p. 318; *Sexton* vs. *Boston*, and *Egan*, Int. party (1). BETHUNE, for Plaintiff, argued that however necessary it may be in England to make proof of service by affidavit, it could not be insisted on in Lower Canada. In England, the subpœna is not served, as here, by a public officer. When therefore an application like the present is made in England, proof of service by affidavit is absolutely necessary, otherwise the court would be without evidence that a subpœna was served at all, much less that it was served personally. Here, on the contrary, we have the return of service by the public officer made on his oath of office, and have consequently no need for an affidavit; all that the affidavit could establish being already fully supplied by the official return. Then, as to the necessity of exhibiting the original writ, no such practice has ever prevailed in this country. And, upon the question of previous tender of fees or expenses, a witness residing in the city was bound to attend under our system, without such previous tender.

PER CURIAM: I can see no difficulty in maintaining the present rule, but, as this is the first case that I am aware of where the proceedings have been allowed by the witness to proceed so far as the maintaining of the rule, I shall grant the Defendant a *locus pœnitentiæ*, and order him consequently peremptorily to appear on a fixed day. In maintaining this rule, I do not hesitate to say that I am against the Defendant on all the points raised by his counsel. Rule for contempt maintained. (8 *J.*, p. 41.)

STRACHAN BETHUNE, for Plaintiff.

ABBOTT & DORMAN, for Defendant.

APPEAL.—RENUNCIATION OF THE JUDGMENT.

COURT OF QUEEN'S BENCH, Montreal, 12th November, 1863.

Coram Hon. SIR L. H. LAFONTAINE, Bart., Ch. J., DUVAL, J., MEREDITH, J., MONDELET, A. J.

CHARLES BROWN *et al.*, Defdts in court below, Appellants, *and* PHILIP WOOD the second, Plff in court below, Respondent.

Held: That where a manifest error exists in the judgment of the court below, and the party who might claim the benefit of such error desists therefrom by *acte de désistement* fyled *au greffe*, and notification thereof

(1) Une règle pour mépris de cour contre un témoin qui ne répond pas à un *subpœna* ne sera pas accordée, à moins qu'on ne prouve par affidavit la signification personnelle du *subpœna* et qu'on ait offert au temoin ses frais de déplacement. (*Sexton* vs. *Boston*, et *Egan*, intervenant, C. S., Montréal, 21 février 1861, BADGLEY, J., 9 R. J. R. Q., p. 356.)

served on the opposite party before service of writ of appeal, such error will be held to be effectually cured, and an appeal, instituted for the mere purpose of curing such error, will be dismissed with costs. (1)

This was an appeal from a judgment rendered by the Superior Court for the district of Bedford, on the 15th day of May, 1862. The action, in the court below, was instituted for the recovery of $400, as a balance due by Appellants on their note in favour of Respondent, for $1000 ($600 having been paid on account on the 2nd December, 1861), and interest on the $400 from the 2nd December, 1861, and on the $1000 from the date of the note (2nd November, 1861) to the 2nd December, 1861, and costs. The Appellants pleaded a *défense au fond en droit*, assigning the following reasons: 1. " Because Plaintiff, in and by his declaration, describes and sets forth a promissory note not bearing interest, yet, erroneously alleges that, by law, interest is exigible on said note from the day of its date until paid, and concludes accordingly." 2. " Because the conclusions taken by Plaintiff in his declaration do not logically flow from the premises thereof, inasmuch as the promissory note sued on is therein described as not bearing interest, yet interest is demanded thereon previous to its maturity, and from the day of its date ; and inasmuch as Defendants are not sued severally, neither jointly with the third drawer of said note, nor in manner as they contracted." 3. " Because Plaintiff, in and by the conclusion of his declaration, prays for a judgment for a greater amount than the instrument described in his declaration warrants him in asking for, and because, by law, this court cannot render judgment for a less sum than is prayed for in an action of special *assumpsit* on a promissory note." The Appellants also pleaded a *defense au fond en fait*. On the 14th February, 1862, the parties were heard on the issue raised by the *défense au fond en droit*, and the court dismissed the plea. The case having been inscribed for final hearing on the merits, the court rendered the following judgment on the 14th May, 1862 : " The court &c., it is considered and " adjudged that Plaintiff do recover from Defendants, jointly " and severally, the sum of $400, as and for the balance of the " promissory note fyled dated at Sweetsburg, on the 2nd day " of November, 1861, made by Defendants and Asa Hastings, " jointly and severally, to the order of Plaintiff, for the sum " of one thousand dollars, payable in thirty days from date, " for value received, with interest on one thousand dollars, " from the second day of November, 1861, up to the fifth day " of December, 1861, and interest on the sum of four hundred " dollars from the fifth day of December, 1861 ; until actual

(1) V. art. 1128 C. P. C.

" payment and costs of suit *distraits* to S. W. Foster, attorney " for Plaintiff." In the foregoing judgment there is a manifest error, in so far as Appellants are condemned to pay interest on $1000 from the 2nd November, 1861, to the 5th of December, 1861, which no doubt arose from the fact that, in the declaration, Respondent claimed such interest; the prothonotary, in ordinary cases like the present, being in the habit of guiding himself in great part by the conclusion of the declaration. The error above alluded to having been discovered, Respondent notified Appellants in writing, on the 13th of June, 1862, that he desisted from that part of the judgment awarding him the interest in question, and fyled the notice, with bailliff's certificate of service, in the office of the prothonotary of the court below, on the 14th of June, 1862. As an additional precaution, he also fyled, on the 16th of June, 1862, an *acte* of *désistement* of such interest, and, on the 17th of June, 1862, and before the service of the present appeal, served Appellants with a copy of the *désistement*, together with a notice at foot calling attention thereto. DOHERTY, for Appellants, argued that the *désistement* referred to, even were it of record, and fyled *en temps utile*, which was not the fact, unaccompanied by an offer to pay the costs of appeal, can have no effect; and, further, that the judgment appealed from being erroneous, and standing against him, he had a right to its reversal, in so far as it is illegal, notwithstanding *any désistement* that Respondent may be pleased to fyle. Respondent's declaration, that he would not execute the judgment, cannot save it in appeal: if illegal, the party against whom it exists has a right to its correction or reversal, without regard to anything said or done by his adversary, *after the rendering thereof*. The Appellants, however, have been always willing, and still are, to acquiesce in a *désistement* properly put of record, and, upon payment of costs of appeal by Respondent; although by law, entitled to the reversal of the judgment, in so far as complained of by their reasons of appeal, which they respectfully pray for.

BETHUNE, for Respondent, contended that the present appeal having been instituted, as indicated by the reasons of appeal, for the sole purpose of curing the error which Respondent had already *in a double form* corrected, it was manifest that the costs of such appeal must fall on Appellants, the necessity of an appeal having been entirely removed before the issuing even of the writ.

The court, *nemine contradicente*, confirmed the judgment of the court below, with costs. (8 *J.*, p. 53.)

MARCUS DOHERTY, for Appellants.

BETHUNE and DUNKIN, for Respondent.

PRACTICE.—NOTICE TO PARTIES.

COURT OF QUEEN'S BENCH, Montreal, 8th September, 1862.

IN APPEAL (From the Superior Court, district of Montreal.)

Coram AYLWIN, J., DUVAL, J., MCCORD, *ad hoc*, J., POLETTE, *ad hoc*, J.

WILLIAM MANN *et al.*, Plaintiff *par reprise* in the court below, Appellants, *and* SAMUEL WENTWORTH MONK, *mis en cause* in the court below, Respondent.

Held: That of applications made to the Superior Court for the payment of moneys claimed by parties in a cause, notice must be given to other parties interested in the judgments or orders pronounced in the cause. (1)

The sum of £4752 8 0 was claimed by Appellants, and formed part of the sum of £5056 18 0, deposited in the hands of the then joint prothonotary of the then Court of Queen's Bench, at Montreal, to await the further order of that court. Several rules were taken upon Respondent, survivor of the joint prothonotary, to show cause why he should not pay over the first amount £4752 8 0, to Appellants, and from adverse decisions on all these rules, thus taken by Appellants, the present appeal was instituted. The deposit was made in the united causes.

STUART, for Respondent, argued that, inasmuch as Respondent was the sole surviving depositary of the moneys in question, for and on behalf of all the parties, Plaintiff and intervening, in the above united causes, it was Respondent's imperative duty, in so far as he could take any action in the matter, to see that all the parties were now before the court, or, at least, in a position to have their rights, if they had any, also finally adjudicated upon. Under all the circumstances of the case, it should be formally and finally adjudicated whether any other parties in the original suits had or had not any right to the whole or part of the money claimed by Appellants. However desirous Respondent might be to see the matter finally disposed of, and, although, in furtherance of that object, he had not only, on all occasions, carefully abstained from every proceeding calculated to cause delay, but, in so far as his duty would permit it, sought to aid the late Mr. Hutchinson and Appellants in advancing proceedings in these causes, yet, he conceived it would be a grave misapprehension of his duty, as an officer of the court and the judicial depositary of such a large sum, if he failed to point out to the court that only

(1) V. art. 462 C. P. C.

three parties out of between 30 and 40 had notice of these proceedings in the court below, and even those who were notified were not made Appellants here. He cited *Gillespie et al.* vs. *Spragg.* (1)

"The court, seeing that of the several applications made by Appellants to the Superior Court, for the payment of the moneys by them claimed, no notice has been given to the parties interested in the judgment or orders to be pronounced thereon, and that, in consequence of such omission, Appellants were not entitled to the prayer of their several demands, this court doth confirm the judgment pronounced by the Superior Court, on the twenty-second day of February, 1862, rejecting the motion of William Mann and others for a rule on Samuel Wentworth Monk, prothonotary, requiring him to show cause why he should not forwith pay over to William Mann and others the several sums of £3450 15 3½, with the sum of £1299 12 9, forming together the sum of £4750 8 0½, awarded to James Hutchinson, by the order or judgment of the judicial committee of Her Majesty's privy council, rendered on the sixteenth day of February, 1838, and the decree of Her Majesty in her privy council of date the thirteenth day of May, 1850, as amended by the further decree of date the eleventh day of February, 1852, and why the said order or judgment and decrees should not be executed as regards said moneys. This court doth further confirm the interlocutory judgments herein rendered on the thirtieth day of December, 1861, rejecting a motion made by William Mann and others, for an order upon Samuel Wentworth Monk, to pay William Mann and others. And this court doth further confirm the interlocutory judgment rendered the thirtieth day of November, 1861, rejecting a petition made by William Mann and others for the payment to them of the said moneys. (8 *J.*, p. 55.)

CROSS and BANCROFT, for Appellants.

H. STUART, for Respondent.

(1) Les deniers, consignés en cour par un tiers-saisi, ne peuvent, après qu'il a été décidé à qui ils appartiennent, être retirés sur motion par celui qui y a droit, sans qu'avis ait été donné à toutes les parties dans la cause et à des intervenants qui prétendent avoir des droits sur ces derniers et dont les prétentions ne sont pas encore décidées. (*Gillespie et al.* vs. *Spragg et al.*, et *McGill et al.*, tiers-saisis, et *Hutchinson et al.*, intervenants, C. S., Montréal, 18 juin 1855, BOWEN, J. en C., et VANFELSON, J., 10 R. J. R. Q., p. 69.)

EXCEPTION À LA FORME.—RAISON SOCIALE.

COUR SUPÉRIEURE, Montréal, 30 mars 1864.

Coram BERTHELOT J.

TALIORETI *vs.* DORION *et al.*

Jugé: Que des personnes, ci-devant en société, ne peuvent être poursuivies comme associées, quoique leur responsabilité n'ait pas été changée par la dissolution de la société, et que leur droit d'être poursuivies dans leurs qualités propres est suffisant pour faire débouter l'action sur une exception à la forme. (1)

Les Défendeurs, qui avaient fait affaires en société sous le nom de "Dorion et frère," dissolvent leur société et enrégistrent la déclaration de dissolution, le 27 mars 1863. Le même jour, une nouvelle société est formée entre les mêmes frères et un tiers, sous le nom de Dorion et Cie. La nouvelle société fait enrégistrer sa déclaration et s'établit au même endroit, en changeant les enseignes. Le 10 avril, 1863, le Demandeur, prétendant que les Défendeurs (Dorion et frère) détiennent des objets à lui appartenant, prend une saisie-revendication contre eux et les désigne comme étant encore en société. De là exception à la forme, fondée sur le fait que les Défendeurs ne sont plus en société et sont mal assignés. Le Demandeur répond qu'en admettant que tous les allégués de la déclaration fussent vrais, la responsabilité des Défendeurs étant la même, soit qu'ils fussent encore en société ou non, il était indifférent qu'ils fussent assignés comme associés ou comme ci-devant associés. Il se trouvait dans la position d'un homme qui ayant été commerçant, puis ayant cessé de l'être, se plaindrait d'avoir été assigné comme commerçant.

PER CURIAM: Ce n'est pas le moment pour la cour de déterminer en quoi la dissolution de la société peut affecter la responsabilité des Défendeurs. Ils sont assignés comme associés; ils ne le sont plus. Ils ont droit d'être amenés ici en leurs qualités propres. Exception maintenue. Action déboutée. (8 *J.*, p. 93.)

DOUTRE et DOUTRE, pour le Demandeur.

MOREAU, OUIMET et CHAPLEAU, pour les Défendeurs.

(1) V. art. 49 et 50 C. P. C.

NUISANCE PUBLIQUE.—DOMMAGES.

SUPERIOR COURT, Montreal, 30th June, 1863.

Coram SMITH, J.

BIENVENU *vs.* COTÉ.

Held: That no damages can be claimed by reason of the abatement of a public nuisance. (1)

The Plaintiff sued *in forma pauperis*, and her action claimed the sum of $204.86, by way of damages, for the destruction of a shanty belonging to her in which she had been carrying on a fruit trade, and for the articles of furniture which she had put in said shanty. The facts of the case were these: The Plaintiff had erected a wooden shanty on a lot of ground, in the city of Montreal, belonging to Defendant, and which lot of ground he had rented to another person. The Defendant, having been duly notified, by the proper officer of the corporation of Montreal, to remove that shanty which had been so erected contrary to that bye-law of the corporation prohibiting the erection of wooden buildings within the limits of the city, called upon Plaintiff to demolish and take away her shanty. She promised to do so, but always neglected to conform herself to the requirements of the bye-law. About the 10th November, 1862, Plaintiff having previously abandoned the shanty, but, having left, however, a small quantity of furniture in it, Defendant, who was liable to a penalty, as the owner of the lot, thought proper to demolish it, and the boards and furniture were scattered about, so as to abate the nuisance. Thereupon, Plaintiff brought an action against Defendant for $84.86 for the value of the shanty and furniture, and $120 for damages in her trade. The Defendant specially pleaded. " Que la Demanderesse a usurpé et empiété sur le terrain du Défendeur, et y a établi un *shanty*, contrairement aux lois de police en force en la cité de Montréal, et y a érigé ce *shanty* en bois, en violation des lois municipales et de police en force en la dite cité de Montréal, et y a, sciemment et frauduleusement, et par cette voie de fait, causé au Défendeur des dommages considérables, en usurpant ainsi sa propriété et en y érigeant et y causant une nuisance publique; et, par telle voie de fait, elle a exposé le Défendeur à des poursuites pénales qui pouvaient être dirigées contre lui par la corporation de la cité de Montréal, tant et aussi longuement que telle nuisance publique existait sur le terrain du Défendeur; que la De-

(1) V. art. 1053 C. C.

manderesse, après avoir ainsi commis telle voie de fait, et avoir érigé une nuisance publique sur le terrain du Défendeur, a été notifiée, à diverses reprises, de faire disparaître telle nuisance publique, et ce, tant de la part du Défendeur que de la corporation de Montréal, et a souvent promis de l'abattre et de la faire cesser ; mais a toujours néanmoins négligé de ce faire, au grand dommage du Défendeur, qui se trouvant responsable de telle nuisance publique comme propriétaire du terrain sur lequel tel *shanty* qui était une nuisance publique, avait été construit, a été notifié par Jean-Baptiste Dubuc, inspecteur du département du feu de la corporation, le vingt-sept octobre dernier, de faire abattre et disparaître tel *shanty* sous dix jours, et, à défaut de ce faire, de payer la pénalité fixée par la loi en pareil cas ; que la Demanderesse a souvent reconnu et avoué qu'elle avait usurpé le terrain du Défendeur, et commis une voie de fait et érigé sur le dit terrain une nuisance publique, et a souvent promis de se conformer aux règlements de la corporation de la cité de Montréal, en abattant la dite bâtisse sans délai, mais néanmoins a toujours négligé de ce faire, quoique dûment requise et notifiée ; que, par suite de la mauvaise foi de la Demanderesse, et par son fait et la contravention par elle ainsi apporté aux lois du pays et aux lois municipales et de police de la cité de Montréal, elle ne peut en loi réclamer aucun dommage à l'encontre du Défendeur, qui était tenu de se conformer aux dites lois, et qui a dû s'y soumettre sous peine de graves amendes et de pénalités, et même d'emprisonnement." The Defendant relied on the following authority : "It being " admitted, then, that there are occasions when there is some- " thing to abate, it may be remarked, that any person may " abate a public nuisance, (1) and that it is not necessary to " shew upon a justification of such an abatement, that as " little damage was done as might be." (2) The judgment of the Court is as follows : "La Cour maintient l'exception " plaidée par le Défendeur à cette action, et déboute cette ac- " tion, mais sans frais." (8 J., p. 94.)

C. ARCHAMBAULT, Attorney for Plaintiff.

LAFRENAYE et ARMSTRONG, Attorneys for Defendant.

(1) 1 Salk., 458 ; Cro. Car., 184 ; 16 Vin. ab., Nuisance, W. 8.

(2) Hawkins, C. 75, S. 12.

MINOR.—CUSTODY.

COURT OF QUEEN'S BENCH, Montreal, 2nd March, 1863.

IN CHAMBERS.

Coram S. C. MONK, A. J.

Ex parte PETER COOPER, ès-qualité, Petitioner for Writ of *Habeas Corpus, and* JOHN E. TANNER, Defendant.

Held: That a minor aged upwards of 16 years, has a right to choose the person with whom she will reside.

The petitioner, in his petition fyled the 17th Feb., 1863, made the following statement: " That, on the sixth day of August, 1858, your petitioner was duly appointed tutor, by *acte d'avis de parents et amis*, homologated before Monk, Coffin and Papineau, Prothonotary of the Superior Court, District of Montreal, on the said sixth day of August, to Jane Shaw, then of about the age of thirteen years, and the daughter of Frederick Shaw, and of Jane Cooper, his wife, both of whom departed this life previous to the sixth of August, leaving issue of their marriage the said minor, Jane Shaw; that your petitioner, who is the uncle of the said minor, with a view of giving to the said minor a suitable education, placed her under the care and tuition of the Misses McIntosh, of the said City of Montreal, who keep and conduct a most respectable female academy, in Montreal, and with whom Jane Shaw has also resided as a boarder during a period of about two years; that, on or about the 24th of December last, Jane Shaw left the house of the Misses McIntosh, for the purpose of attending upon Margaret Shaw, her sister, who was then in ill health, and who has since, on or about the 3rd of February instant, at Montreal aforesaid, died. Your petitioner further alleges that Margaret Shaw was the wife of John Emmanuel Tanner, also of Montreal, Minister of the Evangelical Church, Montreal, and that the said minor, by the death of petitioner's brother, hath become entitled to a very large amount of real and personal property; that, since the death and burial of her sister, Jane Shaw hath continued to reside with John Emmanuel Tanner, at Montreal, and she is now in the custody and possession and under the control of Tanner, who detains, harbours and keeps the said minor without any legal right, warrant, or authority whatsoever, and against the will of her uncle and tutor; that your petitioner, being the uncle and legal tutor of said minor, hath a right to obtain the custody and possession of the said minor, and to have her placed under his care and

protection. Wherefore your petitioner prays justice in the premises, and that your Honours, or one of you, will order that a writ of *Habeas corpus* do issue in due course of law, directed to John Emmanuel Tanner, and returnable before your Honours, or one of you, without delay, commanding Tanner to have Jane Shaw, so detained by Tanner, before your Honours, or any one of you, without delay with the cause of her detention, and, further, prays that the said minor may be released from her present illegal detention and be given up and restored to your petitioner, her uncle, tutor, and legal guardian, and such other and further proceedings had as law and justice may require." Upon this petition, which was sworn to, Samuel Cornwallis Monk, Assistant Judge of the Superior Court, to whom the same was presented, under Cap. 95 of the Consolidated Statutes of Lower Canada, ordered the issue of a writ of *Habeas Corpus*, addressed to Defendant and containing the following order: "We command you that you have the body of Jane Shaw, minor child, the lawful issue of the marriage of Frederick Shaw, and Jane Cooper his wife, detained in your custody (as it is said) under safe and secure conduct, together with the cause of her capture and detention by whatsoever name Jane Shaw be called in the same, before the Honorable Samuel Cornwallis Monk, one of our Assistant Justices of our Superior Court, for Lower Canada, at his Chambers, in the Court House, in our City of Montreal, immediately after the receipt of this writ, to do and undergo all and singular those things which our said Justice shall then and there consider of her in this behalf, and have you then and there this writ." To this writ Tanner made the following answer under oath: "John Emmanuel Tanner, in answer to the writ of *Habeas Corpus* served upon him, returns that he does not detain Jane Shaw in his custody, nor is Jane Shaw confined or restrained of her liberty; that Jane Shaw is at present here in Court, and can answer for herself, being of mature years, namely, being aged seventeen years and nine months; that Jane Shaw is sister of Tanner's late wife, Margaret Shaw, who departed this life on the second day of February instant (1863); that Tanner and his said late wife, about two years ago, presented a petition for annulling the appointment of Peter Cooper as tutor of Jane Shaw, for grounds set forth in the petition, and the said petition is still pending and undetermined; and Jane Shaw has made option to live with Tanner and his wife, and Peter Cooper is an unfit person from his habits and character, and from the litigation in which he has been engaged with his niece, Jane Shaw, to have the custody of the person of Jane Shaw, who is moreover of sufficiently advanced age and mature

understanding to make option of her place of abode." The parties were heard in Chambers, and the minor attended, and was examined privately and apart by the Judge.

" Having seen the return made to the annexed writ by John Emmanuel Tanner, of the city of Montreal, Minister of the Evangelical Church, Montreal, I do order that the said return be fyled, and, having read the said return, and heard the parties, John Emmanuel Tanner and Peter Cooper, by their Counsel (and moreover having personnally examined the minor, Jane Shaw, by herself apart ; considering that proceedings have been taken in the interests of the minor Jane then by her late sister, Margaret Shaw, in the Superior Court, Montreal, to annul and set aside the nomination of Peter Cooper as tutor to the minor, which proceedings are still pending and undetermined ; considering also that the minor is aged upwards of sixteen years, and is capable of exercising a sound discretion, (1) and it appearing that she is not under any illegal or improper restraint, it is adjudged and declared that the return of John Emmanuel Tanner to the said writ is sufficient, and is hereby maintained, and that the petitioner take nothing by the petition, and it is further ordered that the said minor, Jane Shaw, be allowed, and she is hereby allowed to chose the person with whom she will reside. (8 *J.*, p. 113.)

B. DEVLIN, for petitioner.

F. W. TORRANCE, for Defendant.

(1) The *London Times* publishes the following from the latter of its Dublin Correspondent who writes under date 27th June, 1863 : "The Court of Queen's Bench gave judgment this day in an important *Habeas Corpus* case, which came before them on an application by William Connor, to have his son, who is at present an inmate of the "Bird's Nest" at Kingston, delivered into his custody. The question in the case was narrowed to the point whether the boy, being admitted over 14 years of age, was entitled to choose his domicile irrespective of the wishes of his father. The Chief-Justice, Mr. Justice HAYES and M. Justice FITZGERALD, held that 14 years of age was the period when the boy should be regarded as having the right to exercise his will against the wish of his father. Mr. Justice O'Brien dissented, and held that 16 years was the period when the boy should be taken as emancipated from the authority of the father as regards his domicile. "

Vide Forsyth, *Custody of Infants*, p. 106.

" Hurd, Writ of *Habeas Corpus*, pp. 527-536.

CAUTIONNEMENT.—DELAI AU DEBITEUR PRINCIPAL.

COUR DU BANC DE LA REINE, Montréal, 19 juin 1832.

Coram REID, C. J., PYKE, J., ROLLAND, J.

SMITH *et al. vs.* PORTEOUS.

Jugé : Que le délai accordé au débiteur principal pour acquitter son obligation, sans le consentement de sa caution, ne libère pas la caution. (1)

La déclaration contient en substance ce qui suit : Le 1er février, 1822, par obligation reçue à Montréal devant Bédouin et son confrère, notaires, Alexandre Reid se reconnut endetté envers Elizabeth Mittleberger, en sa qualité de tutrice à ses enfants mineurs, en une somme de £400 qu'il promit de payer dans les cinq ans à compter de la date du dit acte, avec intérêt. Pour assurer le paiement de la dite somme, John Porteous, le Defendeur, intervînt à l'acte et se porta caution pour Reid envers Elizabeth Mittleberger, ce acceptant, en sa dite qualité, s'engageant, dans le cas où Reid deviendrait insolvable, à payer la dite somme ou partie d'icelle personnellement et comme principal obligé. Un billet de £100, signé par Reid et endossé par le Défendeur en faveur des Demandeurs, avait été protesté à défaut de paiement. Une action fut intentée contre Reid pour le recouvrement des sommes sus-mentionnées, montant de l'obligation et du billet, en octobre, 1829. Jugement fut obtenu et exécuté. La discussion d'Alexander Reid n'ayant produit qu'un retour de carence, les Demandeurs sont bien fondés à intenter la présente poursuite contre John Porteous, fidéjusseur d'Alexander Reid. Le Défendeur allégua : Qu'après la passation de l'acte notarié mentionné en la déclaration, et avant que la somme que Reid s'était obligé de payer fut devenue due, Elizabeth Mittleberger, ès-qualité, avait, à l'insu et sans le consentement du Défendeur, prolongé le terme du paiement du capital et des intérêts de la dite obligation ; que, durant la prorogation du terme ainsi accordé à Reid, à l'insu et sans le consentement du Défendeur, Reid est devenu insolvable et en déconfiture, ce qui, par les lois de la Province, rend nulle l'obligation principale de Reid et l'obligation du Défendeur, comme caution, et que, par là, le Défendeur se trouvait déchargé de son obligation. La question qui s'élevait dans cette instance était de savoir si la prorogation du terme de paiement d'une obligation, accordée au principal obligé, à l'insu et sans le consentement-

(1) V. art. 1961 C. C.

tement du fidéjusseur, libère la caution. (1) Le 19 juin, 1832, jugement fut rendu condamnant le Défendeur à payer le montant de l'action. (8 *J.*, p. 116.)

OGDEN et BUCHANAN, pour les Demandeurs.
SEWELL et GRIFFIN, pour le Défendeur.

SINDICS POUR LA CONSTRUCTION DES EGLISES.—CORPORATION.

COUR SUPÉRIEURE, Montréal, 30 avril 1864.

Coram MONK, juge.

DUCHARME *vs.* MORISON *et al.*

Jugé : Que les syndics pour la construction des églises, etc., élus avant la passation du chapitre 18 des statuts refondus pour le Bas-Canada, sec. 21, ne forment pas une corporation. (2)

Le Demandeur réclamait la somme de £166 15 10, balance due en vertu d'un marché qu'il avait passé avec les Défendeurs, comme syndics pour la construction d'une église et sacristie en la paroisse de St Gabriel de Brandon, le 29 mars 1855, Chalut, N. P. Il concluait contre les Défendeurs, au nombre de sept, à ce qu'ils fussent condamnés à lui payer cette somme, " en leurs qualités de syndics légalement nommés pour sur- " veiller la construction d'une église dans la paroisse de " St Gabriel de Brandon." Les Défendeurs plaidèrent une défense en droit par laquelle ils prétendaient : 1° " Que, " d'après les lois du pays et les allégués de la déclaration, il " appert que les Défendeurs ne peuvent être condamnés in- " dividuellement, mais seulement comme corps incorporé ; " 2° que par les lois du pays, les Défendeurs sont incorporés " sous le nom de " les syndics de la paroisse de St Gabriel de " Brandon," et constituent, sous ce nom, un corps politique et " incorporé, et partant aucune condamnation ne peut être pro- " noncée contre eux que suivant la loi créant telle corporation."

LAFRENAYE, pour les Défendeurs : Soutint que, quoique les syndics eussent été élus longtemps avant la refonte des statuts, néanmoins, comme la sec. 21 du ch. 18 des stat. ref.

(1) Cette question a été décidée à Québec, par la Cour du Banc de la Reine, en avril 1848, dans une cause de St. Aubin contre Fortin. La majorité de la cour, composée des honorables juges BOWEN, PANET et BÉDARD, décida, contre l'opinion du juge en chef Stuart : " Que l'extension du délai accordée au débiteur principal par le créancier opère novation quant à la caution et la libère : (Vid. *Revue de la législation et de jurisprudence*, Vol. 3, p. 293). L'honorable juge ROLLAND base son jugement sur ce principe que la caution peut, nonobstant la prolongation du délai, exercer son recours contre le débiteur. (3 *Rev. de Leg.*, p. 293.)

(2) V. art. 3402 S. R. Q.

du Bas-Canada parle des syndics *élus* en vertu du *présent* acte et non pas seulement de ceux qui *seront élus* par la suite, il était évident que, depuis la passation de cette loi, tous tels syndics formaient une corporation. (1) Le mot " présent ; " suivant le ch. 1, des stat. ref. du Bas-Canada, sec. 13, sous-sec. 4, étant censé se rapporter à l'acte en entier et non à la section uniquement. Les sections 7 et 9 du même chapitre déclarent que les dispositions des statuts refondus prévaudront en ce qui regarde toutes les transactions, matière et choses subséquentes à l'époque où ces statuts refondus entreront en force. Merlin, *Rép.*, vbo. *Effet rétroactif.*" Ce n'est pas rétroagir que de subordonner à l'avenir l'exercice de droits résultant " de lois antérieures à telles formalités, à telles diligences, à " telle conditions qu'il plaît à la loi nouvelle d'imposer." La nécessité d'incorporer ces syndics est apparente, lorsque l'on voit que, par la 20me sec. du ch. 18, s'il y a une vacance, elle doit être remplie ; or, que deviendra l'exercice de l'action du créancier pendant cette vacance, et si elle est intentée durant cette vacance, comment pourra-t-il procéder ensuite contre le remplaçant *eo nomine* ? R. ROY : La clause 21 du ch. 18 des stat. ref. du Bas-Canada, invoquée par les Défendeurs, et promulguant l'incorporation des syndics *élus en vertu du présent acte*, n'est pas applicable aux Défendeurs qui ont été nommés en 1854, et dont les fonctions sont depuis longtemps à peu près terminées. En effet, cette clause est un amendement introduit dans la loi en 1860, et les termes, *en vertu du présent acte*, veulent dire du présent acte d'amendement ; cela ressort davantage des sous-sections de la dite clause, où il est pourvu à la manière dont les syndics procèderont à faire confirmer leur élection, à élire un président à préparer un rôle de cotisation, etc., formalités que ne sauraient remplir des Syndics élus plusieurs années auparavant, et qui ont accompli l'objet pour lequel ils ont été nommés. Les Syndics ont été élus en vertu de 2 Vict., Ch. 29, § 9 et 10. Par la clause 9, du chapitre 1er, des statuts ref. du Bas-Canada, il est statué que *si par les statuts refondus, il est innové à quelqu'ancien statut, cette innovation ne pourra affecter que les transactions, choses, etc., à venir, mais en ce qui concerne les transactions choses, etc., antérieures au dit cas, les provisions du statut rappelé auront force et vigueur.* Maintenant, à l'argument tiré du cas supposé du décès d'un des Syndics, la réponse est que le créancier n'aurait qu'à mettre en cause le remplaçant ès-qua-

(1) Ch. 18, sec. 21, " Les syndics *élus* en vertu du *présent* acte pour une " localité, seront connus et désignés sous le nom de " Les syndics de la paroisse, " ou de la mission de.......... (en ajoutant le nom de la localité), et constitueront sous ce nom, un corps politique et incorporé."

lité, que les paroissiens sont requis de nommer par la 20me clause du dit chap. 18.

La cour, après délibéré, a adopté les moyens du Demandeur et débouté la *défense en droit.* (8 *J.*, p. 117.)

R. ROY, avocat du Demandeur.

LAFRENAYE et ARMSTRONG, avocats des Défendeurs.

APPOSITION DES SCELLES.

COUR SUPÉRIEURE, Montréal, 20 avril 1864.

Coram LORANGER, J. EN CHAMBRE.

Exparte PELLETIER, Requérant l'apposition des scellés, *et* TURCOT, Opposant.

Jugé : Que, sur l'opposition faite par une partie à l'apposition des scellés, et sur l'exposé d'un conflit de titres entre l'impétrant et l'opposant, les parties seront renvoyées au principal à l'audience, pour se pourvoir, si elles le jugent à propos.

Le requérant présenta le 1er mars, 1864, une requête aux Juges de la Cour Supérieure, siégeant dans le District de Montréal, exposant que, par le testament solennel de Joseph Augustin Cardinal, en date du 25 janvier, 1864, Montreuil, N. P., et son codicile du 28 janvier, 1864, il avait été nommé un des exécuteurs testamentaires et administrateurs de ce dernier, et que, vu qu'il y avait lieu de craindre le détournement des biens mobiliers de la succession qui étaient dans la maison mortuaire, il requérait l'apposition de scellés sur les biens, meubles, effets et papiers de la succession, et priait le Juge de commettre la personne de Louis S. Martin, Notaire, de Montréal, pour apposer les scellés et agir comme commissaire. Cette requête ayant été assermentée, le permis de faire apposer les scellés, etc., fut donné par l'Honorable Juge Loranger. Le deux mars, 1864, l'impétrant ayant comparu devant le commissaire, et l'ayant requis de procéder à l'apposition des scellés, ce dernier se rendit avec deux témoins à la maison du défunt, où, étant arrivés, ils rencontrèrent Séraphin Turcot, qui déclara qu'il se refusait à l'apposition des scellés, nonobstant la dite ordonnance. Sur cet obstacle et, vu que la maison où était décédé Cardinal avait deux issues, le commissaire a établi à la porte d'entrée et à la porte de sortie, donnant vue sur la cour, deux gardiens et, ensuite, il se transporta devant le Juge qui octroya l'ordonnance suivante : " Vu notre ordonnance en date du 1er mars courant, les acte et procès-verbal du commissaire aux scellés qui y sont annexés, et, ouï le dit commissaire, sur son référé, ce jour, ordonnons au dit Séra-

phin Turcot, tuteur mentionné au procès-verbal de comparaître devant nous, au Palais de Justice, en notre chambre, à dix heures et demie du matin, le 4 de mars courant, pour donner les raisons de son opposition à notre dite ordonnance, et voir ordonner ce que de droit, et, sera la présente ordonnance signifiée au dit Turcot, à la diligence de l'impétrant, Amable Adolphe Pelletier, exécuteur testamentaire de Cardinal. Car si, mandons, etc., à Montréal, ce 3 mars, 1864." Sur la signification de cette ordonnance, Turcot fit une opposition écrite qu'il produisit devant le Juge le 7 de mars, par laquelle il alléguait que Cardinal avait fait un testament solennel, le 11 février, 1864, Labranche, N. P., et l'avait nommé son exécuteur testamentaire, et avait révoqué tous autres testaments; que le jour auquel le commissaire s'était rendu en la maison la vente de meubles devait avoir lieu suivant les annonces données par Turcot; qu'en s'opposant à l'apposition des scellés, il avait eu droit de le faire et était de bonne foi en le faisant, et il concluait à ce que son opposition fût déclarée valable et que l'impétrant fût déclaré n'avoir aucune qualité ni aucun droit pour demander l'apposition des scellés; cette opposition fut assermentée. Le requérant répondit à cette opposition, en alléguant que le testament du 11 février invoqué par l'Opposant était nul, comme ayant été fait à une époque où le défunt n'avait plus l'exercice de ses facultés mentales, et demanda que l'apposition des scellés eût son cours suivant la loi pour la conservation des droits de toutes les parties.

Rainville, pour l'Opposant, soumit les propositions suivantes: 1o. L'Opposant avait-il droit de s'opposer à l'apposition des scellés? Si l'officier, dit Pigeau, vol. 2, p. 284, étant entré, il se présente quelqu'un qui s'oppose à l'apposition des scellés, soit de fait, soit par une simple déclaration motivée ou non, il doit en faire mention; et, s'il n'a pas caractère pour décider, il doit en référer au juge. 2o. Le requérant avait-il qualité pour demander l'apposition des scellés? Non, le testament en vertu duquel il agissait, était révoqué par celui qui nommait l'Opposant exécuteur. 3o. La seule allégation de la part du requérant, dans sa contestation de l'opposition, que le testament du 11 février, 1854, en vertu duquel agissait l'Opposant, est nul, est-elle suffisante pour faire suspendre l'exécution de ce testament? Non, il faut l'inscription de faux suivant Bourjon, vol. 2, p. 379, No. 3. (5e partie des *Testaments*, ch. 12), qui dit, s'il y a une inscription de faux contre le testament authentique, l'exécution du testament est en suspens. Cependant Ferrière, *Grande Coutume*, art. 297, No. 49, vol. 3, p. 433, est d'opinion contraire. " Il faut observer, dit-il, que, quant à l'exécution " du testament, il y a une grande différence entre un testa- " ment par devant notaires, et celui qui est olographe, en ce

" que le testament reçu par devant notaires, au cas qu'il soit " contesté, est *exécuté par provision*, quoiqu'il soit *argué* de " faux, comme il a été jugé par arrêt, du 20 octobre, 1560." 4o. Le commissaire s'est-il présenté à temps pour apposer les scellés? Non, car les meubles sur lesquels il voulait apposer les scellés étaient inventoriés, ainsi qu'il appert par une copie de l'inventaire. Et, dit Pigeau, vol. 2, p. 271, lorsque l'inventaire est commencé on ne peut faire mettre le scellé que sur les meubles qui ne sont pas inventoriés. Denisart, vo. *Scellé*, Nos. 74 et 75, va même jusqu'à dire, que, si l'inventaire est commencé, on ne peut plus faire mettre le scellé, et il atteste que l'usage y est conforme. Après audition des parties et du commissaire sur appointement à cet effet, l'ordonnance provisoire suivante fut rendue : Ayant repris notre ordonnance du premier mars 1864, ordonnant l'apposition du scellé sur les biens mobiliers composant la succession de Joseph Augustin Cardinal, et commettant Louis S. Martin, comme commissaire, aussi celle du trois du même mois de mars de la même année, rendu sur le référé du commissaire, dénonçant l'opposition faite à l'exécution de notre première ordonnance par Séraphin Turcot, en sa qualité de Tuteur aux enfants mineurs de Cardinal, cette seconde ordonnance ayant enjoint à Turcot de faire valoir les causes de son opposition. Ayant entendu Turcot et pris connaissance de ses moyens d'opposition produits devant nous, ayant également entendu l'impétrant Pelletier, en réponse aux moyens d'opposition et pris connaissance de sa réponse écrite, ayant également entendu le commissaire au scellé, Martin : Renvoyons au principal les parties à l'audience, pour se pourvoir, si elles le jugent à propos, contre chacun des deux testaments et codicile de Cardinal, produits, l'un par Pelletier, c'est-à-dire, le testament du 15 janvier 1864, reçu devant Mtre Montreuil, et le codicile du 28 janvier de la même année, reçu devant le même notaire, et l'autre produit par Turcot, c'est-à-dire, le testament reçu le onze février 1864, par LaBranche, notaire, et, par provision, ordonnons, sans préjudicier au principal, que, vu qu'il appert que Turcot a vendu les biens mobiliers de la succession, les sommes provenant de cette vente, seront par lui déposées à ses risque et péril et sous sa responsabilité, dans une banque incorporée de cette cité, pour y demeurer ainsi en dépôt, jusqu'à ce que jugement en dernier ressort soit rendu sur la validité de l'un ou l'autre testament et codicile ; les dites sommes devant être retirées par les personnes que le jugement déclarera avoir droit à icelles, frais réservés. Montreal, 20 avril 1864. (Signé) T. J. J. Loranger, J. C. S (8 *J.*, p. 119.)

Lafrenaye et Armstrong, avocats de l'Impétrant.

Rainville, avocat de l'Opposant.

INTERROGATOIRES SUR FAITS ET ARTICLES.

COUR SUPÉRIEURE, Montréal, 31 mai 1864.

Coram MONK, juge.

LAMOUREUX *vs.* BOISSEAU.

Jugé: Que la signification d'une règle pour interrogatoires sur faits et articles, faite au greffe pour une partie absente, est insuffisante. (1)

La règle pour interroger le Demandeur qui est absent de la province, ayant été signifiée au greffe, et, le 27 mai 1864, le Demandeur ayant été appelé pour y répondre, et ayant fait défaut, le Défendeur fit motion que les interrogatoires fussent tenus *pro confessis.*

PER CURIAM : La cour réfère aux précédents de cette cour sur ce point (2), et, en conséquence, rejette la motion du Défendeur. (8 *J.*, p. 133.)

C. ARCHAMBAULT, avocat du Demandeur.

LEBLANC et CASSIDY, avocats du Défendeur.

(1) La sec. 64 du ch. 83 des stat. ref. Bas-Canada, décrétait que : " S'il est nécessaire qu'un ordre, règle, avis ou procédure, émanant de la Cour Supérieure ou de la Cour de Circuit, ou de tout juge, ou qu'un incident quelconque dans une poursuite ou procédure dans aucunes des dites cours, soit signifié dans une cause ou instance, à une partie qui a laissé le Bas-Banada, depuis le commencement de telle cause ou instance ou qui n'est pas domiciliée dans le Bas-Canada, la dite signification pourra être légalement faite à telle partie au bureau du protonotaire ou du greffier de la cour dans laquelle et à l'endroit où sera pendante telle cause ou instance ; et le rapport de l'huissier alléguant qu'il a fait diligence pour trouver la partie et qu'il n'a pu la trouver, et qu'au meilleur de sa croyance cette partie ne se trouve point dans les limites du Bas-Canada, sera *prima facie* suffisant pour établir le fait de telle absence."

(2) Dans *Fenn* vs. *Bowker*, le Demandeur demeurait à Rochester dans l'Etat de New-York, l'un des Etats-Unis d'Amérique. Le 2 octobre 1863, l'huissier signifia une règle avec interrogatoires sur faits et articles, adressés au Demandeur, au bureau du protonotaire à Montréal, et certifia que le Demandeur n'avait pas de domicile dans le Bas-Canada. Le Demandeur, n'ayant pas répondu à cette règle, fit motion pour la faire annuler. La cour, maintenant la motion du Demandeur, a jugé que la signification de la règle avait été insuffisante. (*Fenn* vs. *Bowker*, C. S., Montréal, 31 octobre 1863, BERTHELOT, juge, 7 *J.*, p. 297.)

PRESCRIPTION.—LOYER DE BANC D'EGLISE.

COUR SUPÉRIEURE, Montréal, 31 mai 1864.

Coram MONK, juge.

LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DE VILLE-MARIE DE MONTRÉAL *vs.* MINIER, DIT LACASSE.

Jugé : Que la prescription de cinq ans ne s'applique pas à la location des bancs d'église. (1)

La défenderesse étant poursuivie par une demande rapportable le 28 janvier 1861, pour le loyer d'un banc dans l'église paroissiale de Montréal pour l'année expirée le 1er juillet 1848, plaida la prescription de cinq ans. Les Demandeurs répondirent spécialement qu'il n'existe pas de prescription de cinq ans contre les rentes de bancs ou loyer de bancs d'église, mais que ces sortes de créance ne sont prescrites que par trente ans.

JETTÉ, pour les Demandeurs, cita le texte de l'ordonnance de 1629, qui ne s'applique " qu'aux loyers de maisons et prix des baux à fermes," et prétendit que ces dispositions ne pouvaient pas être étendues au-delà ; qu'en France, comme la location des chaises dans les églises n'est que temporaire et non pas annuelle, comme pour les bancs des églises dans le Bas-Canada, la question n'y a pas été soulevée.

LAFRENAYE, pour la Défenderesse, s'appuya sur un précèdent de la cour, où cette prescription fut maintenue. La cause n° 4301 de la même *Fabrique* vs. *Papineau*, jugement, février 1860, BADGLEY, juge.

PER CURIAM : Nonobstant cette décision, la cour est d'opinion qu'une telle prescription n'existe pas en loi, et que le texte de l'ordonnance ne saurait s'étendre au cas qui a été soumis en cette cause. Jugement pour les Demandeurs. (8 *J.*, p. 133.)

LESAGE et JETTÉ, avocats des Demandeurs.

LAFRENAYE, avocat de la Défenderesse.

(1) Ordonnance de 1629, art. 142 : " Les loyers de maisons et prix des baux " à fermes ne pourront être demandés cinq ans après les baux expirés." V. art. 2250 C. C.

FEMME SÉPARÉE DE BIENS.

COURT DE CIRCUIT, Montréal, 23 mai 1864.

Coram MONK, juge.

ERICKSON *vs.* THOMAS.

Jugé : Que la femme séparé de beins a le pouvoir d'ester en jugement sans l'assistance de son mari quant aux actions qui concernent l'administration de ses biens. (1)

La Demanderesse poursuivait pour le recouvrement d'une somme de $99.41, étant le montant d'un compte courant que le Défendeur lui devait, comme marchande publique, et, de plus, comme séparée de biens de son mari. Elle s'était portée seule Demanderesse, sans être assistée de son mari. Le Défendeur plaida une exception à la forme, par laquelle il prétendit qu'elle ne pouvait pas ester en jugement seule et sans l'assistance de son mari.

PER CURIAM : La femme séparée de biens, et dont la séparation est dûment exécutée, a le droit de porter seule les actions mobilières et qui regardent l'administration de ses biens. Exception à la forme renvoyée. (8 *J.*, p. 134.)

LAFRENAYE et ARMSTRONG, avocats de la Demanderesse.

PERKINS et STEPHENS, avocats du Défendeur.

SAISIE-ARRET AVANT JUGEMENT.

COUR SUPÉRIEURE, Montréal, 30 mars 1864.

Coram LORANGER, juge.

RODDEN *vs.* OLLIER, *et* BAULNE *et al.*, T. S.

Jugé : Que la saisie-arrêt avant jugement peut être attaquée par une défense au fond.

PER CURIAM : La question se présente sur une motion faite par le Demandeur pour faire rejeter une défense au mérite, qui n'attaque pas l'action elle-même, mais la saisie seulement. Le Défendeur, qui paraît reconnaître qu'il est endetté envers le Demandeur pour la somme réclamée, conteste le droit du Demandeur de prendre une saisie-arrêt ; il allègue qu'il n'y avait aucune cause pour cela ; qu'il n'était ni sur le point de

(1) Pothier, *Traité de la puissance du mari*, n° 61 ; Acte de notoriété, pp. 63 et 130 ; art. 176 C. C.

laisser la province, ni à la veille de dissiper ou recéler ses effets. Le Demandeur conteste au Défendeur le droit d'attaquer la saisie-arrêt autrement que par une exception à la forme ; et il cite, à l'appui de cette prétention, un jugement de la Cour d'Appel (*Molson* et *Leslie*) (1) qui a maintenu une exception à la forme, dont le but était le même que celui de la défense faite en cette cause. (2) Si la cour d'appel n'avait pas décidé en ce sens, il y aurait lieu à discuter si l'exception à la forme est

(1) L'ordonnance du gouverneur et du conseil législatif de la province de Québec de 1787, 27 Geo. 3, ch. 4, contenait les dispositions suivantes : " Il ne sera donné à l'avenir, aucun ordre de saisie-arrêt, (excepté dans le cas de dernier équipeur, suivant l'usage du pays,) contre les biens, dettes et effets quelconques de qui que ce soit, dans les mains du propriétaire, du débiteur ou d'un tiers, avant contestation en cause et jugement, excepté lorsqu'il y a preuve légale sous serment (qui sera endossé sur l'ordre de saisie-arrêt) à la satisfaction d'un des juges de la cour qui donnera tel ordre, que le Défendeur, ou le propriétaire des dites dettes et effets, doit au Demandeur une somme excédant dix livres courant, et qu'il est sur le point de les recéler, ou qu'il est dans l'intention de se cacher, ou de quitter la province, dans la vue de frauder ses créanciers, et que le Défendeur est alors endetté au Demandeur, et qu'il croit sincèrement que sans le bénéfice d'une telle saisie-arrêt, il perdra sa créance, ou souffrira des dommages. Pourvu toujours que rien de ce qui est contenu ici, ne s'entendra à préjudicier aux droits des propriétaires de biens fonds dans le cours ordinaire de la loi, pour le recouvrement de rentes suivant aucune ancienne forme de procéder, en conséquence de toutes lois, usages et coutumes quelconques ; et pourvu aussi que dans le cas, où le Défendeur ou débiteur paiera la dette et les frais, ou donnera caution au shérif ou huissier, de répondre des effets, ainsi saisis et arrêtés, comme dans le cas de cautionnement personnel, sujet à justification en cour, pour répondre de la valeur des effets, et pour satisfaire au jugement de la cour, les dits biens, dettes et effets seront rendus, et à cet effet, il sera alloué au Défendeur ou débiteur quarante-huit heures, après lequel temps, si la dette et les frais ne sont point payés, et qu'il n'ait été donné aucune caution, les effets ainsi saisis et arrêtés resteront sous la garde du shérif ou huissier, pour satisfaire au jugement."

Il a été jugé sous ces dispositions, que l'affidavit est une formalité nécessaire pour l'émanation de la saisie-arrêt avant jugement qui ne peut subsister sans cela ; que l'affidavit donne, par conséquent, l'existence à l'exploit de saisie-arrêt ; que la validité ou invalidité de cet exploit dépend de la vérité ou de la fausseté des faits qui y sont énoncés ; (supposant toujours que, d'après la manière dont ils sont exposés, ils soient suffisants en loi) qu'en attaquant l'affidavit, la partie saisie attaque nécessairement l'exploit, et que cela peut se faire régulièrement par une exception à la forme. (*Leslie et al.*, et *La Banque Molson*, C. B. R., Montréal, 6 septembre 1861, LAFONTAINE, juge en chef, AYLWIN, DUVAL, MEREDITH et MONDELET, juges, renversant le jugement de la C. S., Montréal, 31 mai 1860, MONK, J. A., 11 *R. J. R. Q.*, p. 77.)

(2) La partie d'un plaidoyer à une action, commencée par une saisie-arrêt, sur billet promissoire non encore dû, par lequel le Défendeur nie la déconfiture et le recèlement de ses biens allégués dans l'affidavit et allègue qu'il a continué à retirer ses billets à leur échéance et que l'action est vexatoire, et conclut à ce que l'affidavit soit déclaré non fondé et la saisie annulée, sera, sur réponse spéciale en droit, rejetée comme irrégulièrement plaidée ; ces matières devant être plaidées par une exception comme nullités d'exploit, et non par un plaidoyer au mérite. Vu la pratique suivie par la cour, une défense au fond en droit à partie d'un plaidoyer sera maintenue, quoique, dans l'opinion du juge, une motion eût dû être faite pour rejeter cette partie du plaidoyer, qui était illégale. (*Chapman et al.* vs. *Nimmo*, et *The Phœnix Ass. Co.*, T. S., C. S. Montréal, 31 décembre 1863, SMITH, juge, 12 *R. J. R. Q.*, p. 284.)

bien un mode acceptable de lier contestation avec le Demandeur sur l'un des principaux allégués de sa déclaration ; mais nous devons considérer ce point comme réglé. Toutefois ce jugement ne règle pas la question soulevée en cette cause. De ce que la Cour d'Appel a décidé que la saisie-arrêt pouvait être attaquée par une exception à la forme, il ne s'en suit pas qu'elle ne puisse l'être par une défense au mérite. Un mode n'exclut pas l'autre, et comme celui qu'a adopté le Défendeur semble, tout au moins, aussi rationnel que l'autre, la motion doit être rejetée. Motion rejetée. (8 *J.*, p. 134.)

SNOWDON et GAIRDNER, pour le Demandeur.

DOUTRE et DOUTRE, pour le Défendeur.

SÉPARATION DE BIENS.—DROITS DES CRÉANCIERS.

COUR SUPÉRIEURE, Montréal.

Coram MONK, J. A.

DOUTRE *vs.* TRUDEAU, *et* FONTAINE, T. S.

Jugé : 1° Qu'un jugement en séparation de biens, qui détermine les reprises matrimoniales de la femme, n'est qu'un jugement d'expédience, que les tiers peuvent attaquer.

2° Que la saisie-arrêt, entre les mains de la femme séparée, est une voie régulière de faire rendre à la femme ce qu'un tel jugement lui accorde illégalement.

3° Qu'il n'est pas nécessaire d'une expertise pour constater ce que la femme reçoit illégalement par un tel jugement, quand la preuve est faite autrement d'une manière satisfaisante. (1)

Le Demandeur ayant obtenu jugement contre le Défendeur, pour une somme de $183, et ne pouvant l'exécuter, vu que les biens du Défendeur venaient d'être vendus à la poursuite de sa femme, il fit signifier une saisie-arrêt, après jugement, entre les mains de cette dernière, qui répondit ne rien avoir appartenant à son mari et ne rien lui devoir. Le Demandeur contesta cette déclaration et allégua, que la tiers-saisie venait d'être séparée de biens d'avec le Défendeur, son mari ; que, par le jugement homologuant le rapport de praticien qui établissait les reprises de la tiers-saisie, cette dernière avait obtenu de reprendre certains immeubles qui lui étaient propres ; qu'en faisant l'état des reprises en question, le praticien n'avait tenu et faire rendre à la femme aucun compte des améliorations faites sur ces propres durant le mariage ; qu'il était de fait que, durant le mariage, il avait été fait des améliorations considérables sur ces propres, et pour une somme d'au moins seize cents dollars, et beaucoup plus considérable que ne l'était la créance du Demandeur ; la tiers-saisie devait au

(1) V. art. 1304 et 1316 C. C.

Défendeur la valeur de ces améliorations, et qu'en conséquence, le Demandeur était bien fondé à demander qu'elle fût condamnée à payer au Demandeur le montant de sa créance, en principal, intérêt et frais. La tiers-saisie répondit qu'il n'avait été fait que des changements sans importance sur ces immeubles, durant leur mariage, et que leur valeur n'en avait pas été augmentée. A l'enquête, le Demandeur prouva à peu près le chiffre par lui allégué comme étant la valeur des améliorations. La tiers-saisie s'efforça de diminuer l'effet de cette preuve, mais il résulta que, d'après ses propres témoins, les améliorations faites valaient au moins $600. A l'argument la tiers-saisie prétendit que les faits en contestation ne pouvaient êtres déterminés que par une expertise.

PER CURIAM : Le procédé adopté pour corriger l'abus si fréquent de passer les biens du mari dans les mains de la femme, pour les soustraire à l'action des créanciers du mari, est rationnel et conduit directement au but. Une expertise aurait peut-être été nécessaire, si la créance du Demandeur eût menacé d'absorber plus que la tiers-saisie a prouvé elle-même avoir repris d'améliorations avec ses propres, mais, d'après sa propre preuve, elle est endettée envers son mari en une somme beaucoup plus que suffisante pour payer la créance du Demandeur, en principal, intérêt et frais. Jugement pour le Demandeur. (8 *J.*, p. 135.)

DOUTRE et DAOUST, pour le Demandeur.

CARTIER, POMINVILLE et BETOURNAY, pour la T. S.

SECURITY FOR COSTS.

CIRCUIT COURT, Lachute, 25th May, 1864.

Coram LAFONTAINE, J.

STALKER *vs.* HAMMOND.

Held: That a motion for security for costs will be granted, if, more than four days after the return of the action, Plaintiff leaves his domicile in Lower Canada, and resides in the United States, and, although more than two months since the return may have elapsed before any notice of motion was given, provided that the motion is made on the first day of the term next after the discovery by Defendant of this change of residence, and that these facts are established by affidavit. (1)

This case was returned on the fourth of January, 1864. About the end of February, Plaintiff left his residence in

(1) V. art. 29 C. C.

Chatham, C. E., and established himself in business in the State of Michigan. On the 25th May, Defendant moved for security of costs, and filed affidavits establishing the facts, notice of motion having been served on the 23rd of May. BENJAMIN, for Plaintiff, resisted, relying on the 62nd Rule of Practice, requiring every application for security for costs to be made within four days after appearance. HOUGHTON, for Defendant moving, argued that the Statute (Consol. Stats., L. C., p. 726) permitted every Defendant to demand security for costs, in all actions *prosecuted* by any person residing without Lower Canada. It did not restrict this protection to actions *instituted* by Plaintiffs residing abroad and in the present instance, a Plaintiff residing abroad was prosecuting an action against a Defendant here. As far therefore as the statute went, Defendant was clearly entitled to his motion. As to the 62nd Rule of Practice, it was made in virtue of powers granted by Statute (Consol. Stats. page 752 & 754); but these very Statutes, page 753, sec. 4, provide that no rule of practice shall be contrary to or inconsistent with any act of law in force in Lower Canada. If then the Rule of Practice cited were to be construed to defeat Defendant's right to security for costs, it would not be only inconsistent with but directly contrary to the Statute which allows security to be demanded whenever a Plaintiff residing abroad is prosecuting an action in Lower Canada. Due diligence, moreover, had been used; Plaintiff left his domicile here in February, and Defendant moved on the first day of the following term. Previously, he could not have moved, for Plaintiff was described in the declaration as resident here, and did in fact continue to reside here for six weeks after the return. The 58th rule of practice also refers to two motions for security, one mentions the case where the Plaintiff is stated in the declaration to be resident without Lower Canada, and one where no such mention is made. The 62nd rule must necessarily apply to the first of these cases, otherwise the ends of justice might easily be defeated. Such an application of the rule as that sought by Plaintiff is also opposed to the common law. Vide Denisart, vo. *Caution Judicatum Solvi.* "La caution *Judicatum Solvi* peut se demander en tout état de cause principale." HOUGHTON also cited the cases of *Perry* vs. *The St. Lawrence Grain Elevating and Storage Company*, (1) and the cases therein mentioned. Motion granted. (8 *J.*, p. 137.)

L. N. BENJAMIN, for Plaintiff.

J. G. K. HOUGHTON, for Defendant.

(1) Une motion demandant cautionnement pour les frais est faite à temps, bien qu'avis n'en ait été donné qu'après le quatrième jour de la date de la comparution, si cette motion est faite le premier jour du plus prochain terme.

PROCEDURE.—DECLARATION.—EXCEPTION A LA FORME.

CIRCUIT COURT, Montreal, 15th March, 1864.

Coram LORANGER, J.

SCANTLION *vs.* BARTHE.

Held: That, if a certified copy of Plaintiff's declaration be not served upon a Defendant, the action may be dismissed on an *exception à la forme*; and, although the bailiff has returned that he served a true certified copy of the declaration on the Defendant, it is not necessary to inscribe *en faux* against his return, if it be apparent from the copy admitted by Plaintiff's attorney to be the copy served, that said copy never was certified. (1)

In this action, for goods sold and delivered, Defendant fyled an *exception à la forme,* the principal ground of which was that a true and certified copy of Plaintiff's declaration had never been served upon Defendant. The bailiff made his return upon the writ in the usual way, that he had served a true certified copy of the writ and declaration upon Defendant. A copy of a declaration was produced by Defendant and admitted by Plaintiff's attorneys to be the one served. There was no certificate by Plaintiff's attorneys that it was a true copy. Plaintiff's counsel contended that the bailiff's return was the only thing to be looked at. It appeared from it that a true copy had been served. If Defendant denied that he had been properly served, he should have inscribed *en faux* against the bailiff's return, but it was impossible to raise the question by an *exception à la forme.*

PER CURIAM: The question can be raised by an *exception à la forme.* It is quite clear, by the copy admitted by Plaintiff's attorneys to be the one served, that it never was certified. There is no need of further proof; it would be useless trouble and expense to inscribe against the bailiff's return. The law requires that a true and certified copy of the declaration shall be served upon the Defendant. Here the copy was not certified; there was no service in law at all. *Exception* maintained. (8 *J.*, p. 138.)

PERKINS & STEPHENS, for Plaintiff.

LAFRENAYE & ARMSTRONG, for Defendant.

(*Perry vs. The St. Lawrence Grain Elevating and Floating Storage Co.*, C. S., Montréal, 18 septembre 1861, SMITH, J., 5 *J.*, p. 252.)

Le Défendeur, qui a comparu en vacance, peut demander le cautionnement *judicatum solvi* le premier jour juridique du terme suivant, quoique l'avis n'ait pas été donné dans les quatre jours de la date de sa comparution. (*Comstock et al. vs. Lesieur*, C. S., Montréal, 17 octobre 1856, SMITH, J., C. MONDELET, J., et CHABOT, J., 2 *J.*, p. 306.)

Une motion demandant cautionnement pour frais sera rejetée, si avis en a été donné après le quatrième jour de la date de la comparution. (*Tiers et al. vs. Trigg et al.*, C. C., Montréal, 14 décembre 1860, MONK, J., 5 *J.*, p. 25.)

(1) V. art. 50, 56, 79, 116 et 159 C. P. C.

LANDLORD.—PRIVILEGE.—THIRD PARTIES.

COURT OF QUEEN'S BENCH, Montreal, 1st June, 1864.

Coram DUVAL, C.J., MEREDITH, J., MONDELET, A.J., BADGLEY, A. J., DRUMMOND, J.

JOHN AULD, Plaintiff in the Court below, Appellant, *and* DAVID LAURENT et al., Defendants in the Court below, Respondents.

Held: 1o. That a lessor, like an hypothecary creditor, can pursue a third party who holds property subject to his claim for rent without bringing into Court at the same time his debtor.

2o. That a *pianoforte*, belonging to a third party, but proved to have been in the lessee's house as a *meuble meublant*, may be *revendicated* by the landlord, in the hands of the proprietor of the *pianoforte*, by *saisie-gagerie par droit de suite* within eight days after its removal from the house.

3o If the article sought to be revendicated cannot be found, the Defendant into whose possession it has been traced will be ordered to restore it to the house from which it has been taken, or to pay the value to the landlord. (1)

The facts and pleadings in this case fully appear in 12 *R. J. R. Q.*, p. 28, where a report of the judgment of the Court below (SMITH, J.) dismissing the action, is given.

In Appeal: TORRANCE, for Appellant, complained of the judgment, for the following reasons: He submitted that he had a right to pursue his gage, which the piano was, in the possession of Respondents, who had, without his consent, secretly removed it from the house where it had been placed as a *meuble meublant*; so far as Appellant was concerned, Respondents had been guilty of a *voie de fait*, and he had a right to demand of them that they should replace the piano in the place from which they had taken it. The Appellant was also entitled to recover damages from Respondents for the injury done to his house in breaking into it, in order to get possession of the piano. The Court below, appeared to think that Appellant could have no redress against Respondent, unless he made his own tenant a party to the action. The Appellant did not know of any rule of law or equity which required of him to make his tenant a co-Defendant with Respondent If the interests of Respondents required that the tenant should be made a party to the action in the Court below, it was competent to them to bring the tenant into Court, by an action *en garantie*.

In the same Court, BARNARD, for Respondent, argued as follows: 1st. Before he can seek to render an innocent stran-

(1) V. art. 1619 et 1622 C. C., et 868 C. P. C.

ger responsible, Appellant must at least allege, not only that he leased, but that he had the right to lease; the question whether the papers fyled do or do not prove that Auld was proprietor, and the further question whether Auld, as husband, had or had not the right to lease do not arise, because there was no allegation on the subject which Respondents could have traversed or avoided, the introduction of the papers in question in the record was irregular, and, on this ground alone, the action was rightly dismissed. 2nd. Supposing the action had been maintained, Respondents would have had to pay the debt of a stranger, while it would be left uncertain whether they could recover from the supposed original debtor. How can a judgment affirming that Berwick or Pradjet owed a certain amount for rent bind them without their having been made parties to the action? If Pradjet had paid Berwick, would it not be clear that the piano could not be responsible for Berwick's rent; and could not Berwick himself have shewn that for some reason or other the Appellant's action ought to have been dismissed. The action under the circumstances had to be dismissed, because there was no one in the record who could properly contradict the essential allegations, upon which alone the action could rest. 3rd. The *sous seing privé* lease cannot bind third parties. The mere occupation would therefore remain, without anything at all upon which to rest an argument that the occupation of Pradjet was the occupation of Berwick. Has it ever been pretended before that the article of a stranger could be made responsible, although the article is proved to have entered the premises long after the party supposed to have been primarily liable had ceased to occupy? 4th. There is more in connection with this point. Whatever may be thought of the present position of Berwick towards Auld, and the absence or presence of some understanding between them, it must be admitted that some other evidence than that of Berwick must be adduced before we accept the assertions that there was a lease *sous seing privé*; that this lease was continued by tacit reconduction, and that Pradjet continued in possession as the *locum tenens* of Berwick. If Berwick's evidence is rejected there only remains the occupation of Pradjet, and the piano has been attached to answer for the occupation not of Pradjet, but of Berwick. 5th. Finally Respondents contend that the law properly understood does not recognize any such privilege as that claimed, whether a piano is or is not properly a *meuble meublant*. The Appellant could never possibly either *in truth or in fact* have looked to this piano as to his security for the rent to become due by Berwick, which is the first condition to the existence of any privilege. After a first argument be-

fore four judges, a second and third before five judges, (Lafontaine, C.J.,) and a fourth argument before five judges, (DUVAL, C. J.,) the Court reversed the judgment of the Court below.

DUVAL, C. J., *dissentiens*, said: This was the exercise of a right against a third person. He was of opinion that the debtor should have been before the Court. It was said that this was a privileged claim, and that the party might proceed at once against the third party as in an hypothecary action, the creditor proceeded against the *tiers détenteur* without calling in the debtor. His Honour believed there was a difference in the cases. The hypothecary action was an action *in rem*; the creditor had a *titre exécutoire*, and he had a right to proceed against the thing where he found it, the thing being specially mortgaged to him for the payment of his debt. But, in a case like the present, His Honour was clearly of opinion that the debtor should have been called in.

MEREDITH, J., *dissentiens*, thought it only reasonable that the question of the existence of the debt should be discussed in the presence of the debtor, whereas it was disposed of in the present case in his absence. He took the same view as Mr. Justice DUVAL. He took this opportunity of placing his opinion on record, but considered the practice of the Court now settled on the other side, as there had already been a judgment to the same effect in the case of *Desjardins* and *La Banque du Peuple*.

MONDELET, J.: It seems to me that Auld, the Appellant, who had leased a house to Berwick, and who before leaving it sublet it to Pradjet, contrary to the prohibition of Auld, has a right to seize *par droit de suite*, the pianoforte which though it belonged to Laurent *et al.*, still was and became a gage for the rent, the moment it was placed in the house, and was therein a *meuble meublant*. I further think that Defendants are bound to replace the piano where they took it improperly by *saisie revendication*. I don't at all understand the pretensions which Respondents say the Court below held out, that Berwick or Pradjet should have been called in the action of Plaintiff. If it were the interest of Respondent to have them, he should have applied to the Court to have them called in. Upon the whole I think the judgment of the Court below should be reversed.

DRUMMOND, J.: Whenever a debt has to be proved, the debtor, as a general rule, should be called into the case in which such proof is required. I would therefore be disposed to affirm the judgment in the Court below, were it not that the main question in this cause is not really the amount due, but whether the Plaintiff had, or had not, a privilege upon the piano seized for the payment of his rent. And, entertain-

ing no doubt as to the existence of that privilege for the security of the rent to become due, as well as for whatever amount had accrued at the time of the institution of the action, I am of opinion that the judgment should be reversed, with costs, and that Defendant should be ordered to replace the piano on the premises from whence it was taken. As to the damages claimed for injury done to the premises in the removing of the piano, I would not grant them, but would reserve to Appellant such recourse as he may have to recover them, after the decision of the action now pending in the Circuit Court, in which the piano was removed from the premises under the authority of justice.

The judgment in appeal was as follows: "The Court, considering that the piano, which Respondents claim as their property, in and by their *défense*, and which, before being removed by Respondents, in virtue of the writ of seizure of *revendication* at their suit therefor, was in a certain house belonging to Appellant, number one hundred and forty-one, on St. Antoine street, in the city of Montreal, leased by him to John William Berwick, and which piano, being in said house, was by law answerable and security for the payment of the rent of said house; considering that Respondents had no right to remove the piano from the house; considering that Appellant had in law a lien upon the piano, for the purpose of seizing it, *par droit de suite, par voie de saisie-gagerie*, as and in the way he has done, he hath exercised his legal right; considering that the piano was not, on the *process of saisie-gagerie, par droit de suite*, as aforesaid, found in the possession of Respondents, who have removed it from the house number one hundred and forty-one aforesaid, and still detain the same; considering that Respondents are, in law, bound to restore and convey back to the house number one hundred and forty-one the aforesaid piano; considering that, in the judgment of the Circuit Court, for the district of Montreal, of the thirty-first day of December, 1862, dismissing Appellant's action, there is error, this Court doth reverse and annul the said judgment; and, proceeding to render the judgment which the said Court below should have rendered, it is hereby ordered that, within eight days, Respondents do restore and convey back to the house number one hundred and forty-one the said piano, such and in the same state and condition as when by them removed therefrom, in order that the same may be sold in due course of law, and Appellant paid out of the proceeds thereof the said sum of twenty-two pounds ten shillings, by him demanded, as by him claimed for rent due by Respondents; and that, in default of so doing, Respondents do and they are hereby adjudged and condemned to pay and

satisfy to Appellant the sum of twenty-two pounds ten shillings by him claimed from Respondents. (The Honorable Jean François Joseph Duval, chief justice and Mr. Justice MEREDITH *dissenting.*) (8 *J.*, p. 146.)

TORRANCE and MORRIS, for Appellant.

S. RIVARD, for Respondents.

E. BARNARD, counsel.

AUTHORITIES CITED BY APPELLANT: Pothier, *Louage*, no. 241, 2. The privilege is on *all the moveables* in the house as *meubles meublants. Coutume de Paris*, art 161. Troplong, *Hyp.* No. 181. *Aylwin* et *Gilloran*, 12 R. J. R. Q., p. 31 et 4 R. J. R. Q., p. 192: The *engagiste*, as well as the *propriétaire*, has a right of revendication of movables liable to his privilege, and the right is exercised against the party in possession. Guyot, vo. *Revendication*, p. 619. Pothier, *Procédure Civile*, p. 205, P. 4, cap. 2, sect. 4, 2de appen., edition of A. D. 1809. Troplong, 1 *Hyp.*, p. 239, Nos. 161, 162. For forms of proceedings, *Vide* 1 Pigeau, *Pro. Civ.*, pp. 107-121, A. D. 1787, Liv. 2, P. 1, tit. 2, cap. 4 In the parallel case of pursuing the *tiers-détenteur* of an immoveable hypothecated for the payment of a debt, the creditor, in the ordinary hypothecary action, does not make the debtor a co-Defendant. The hypothecary creditor simply directs his action against the party in possession. *Fisher* vs. *Ambault*, decided in appeal, September, 1862, Montreal. In *Desjardins* vs. *La Banque du Peuple*, not nearly so favourable a case for the Plaintiff as the present, the Court of Appeals held that the presence of the debtor was not necessary in the suit, 7 R. J. R. Q., p. 135 et 139, et 11 R. J. R. Q., p. 417. *Spoliatus ante omnia restituendus.* The Appellant has only exercised a conservatory process, and seeks that the wrong-doer should replace the *meuble* in the Plaintiff's house from which he had taken it. The pleadings of Defendant do not raise the question of the necessity of the debtor being made a co-Defendant.

RESPONDENT'S AUTHORITIES: 1st Proposition. The tenant ought to have been made a party. 1 Pigeau, p. 654: " Le débiteur doit être appelé parce qu'il peut avoir quelque chose à opposer." 5 Proudhon, *Usufruit*, No. 2238 in fine: " Avant tout, il faut qu'il fasse preuve de sa propre créance, preuve qui ne peut être établie qu'avec son débiteur direct." Carré et Chauveau, *Pro. Civ.*, p. 32., Brussel's Edition: " Lorsque le droit de revendiquer, se fonde sur une obligation, l'action en thèse générale doit être dirigée contre la personne obligée, car il faut faire juger l'existence de l'obligation." Merlin, Rép., vo. *Revendication*: " Si la chose n'appartient pas au possesseur vous devez faire assigner son bailleur. Il est évident que ce n'est qu'avec le bailleur que la question peut être traitée et jugée." Merlin, Rép., vo. *Contradicteur*: " Un acte est fait sans contradicteur lorsqu'il est fait par défaut ou que l'on n'y a point appelé ceux qui auraient eu intérêt de la contredire." So as to seizures and all judicial proceedings whatever. 1. Ancien Pigeau, 660 for the *saisie-arrêt. Code de Procédure Napoléon.* Art. 563, 565 et 831. Teulet on above articles. Carré et Chauveau, No. 1946. Bioche, vo. *Saisie Rev.* Bioche, vo. *Saisie Arrêt*, Nos. 107, 122. The denunciation to the tenant was the more indispensable in this case, that the lease is *sous seing privé*, which the Respondents submit cannot bind them. Pothier, *Obligation*, No. 750. 1 Pigeau, p. 465. Art. 1338, *Code Civil Nap.*, and Commentators. See particularly Favard, cited by Lahaye on this article. De Vill. et Massé, *Contentieux Commercial.* vo. *Nantissement* Nos. 30, 31. La faillite étant déclarée, les biens du failli deviennent de ce moment la propriété de ses créanciers. La reconnaissance d'une dette ou la confession de jugement de ce failli en faveur d'une personne, ne fait pas preuve de la dette à l'encontre des créanciers, et, si ces derniers contestent cette dette, le Demandeur est tenu d'en faire la preuve lors de l'inscription de la cause à l'enquête. Le paiement par un tiers de sommes dues par un failli ou débiteur insolvable, sans transport ou subrogation et postérieurement à la déconfiture, ne donne pas droit à ce tiers d'être colloqué utilement sur les biens de ce failli. (*Bryson et al.* et *Dickson*, C. B. R.,

Montréal, STUART, J. en C., ROLLAND, J., PANET, J., et AYLWIN, J., cassant le jugement de C. S., Montréal, 3 R. J. R. C., p. 426.) This is a stronger case than that in Bioche, vo. *Saisie Arrêt*, No. 122, as *Laurent* and *Laforce* have an interest that the lease should not be proved. The Appellant relies. 1st, upon authorities applicable to ordinary cases of revendication, where the Plaintiff proceeds either as unquestionable proprietor, or the question is whether the Plaintiff or Defendant is proprietor. 2nd. Upon the authority of 1 Pigeau, p. 629, 116. But there the Plaintiff is executing a judgment, and, though not expressly stated, it is obvious the Defendant must be a party to that as well as to every other proceeding in the case. But admitting that this authority applies, Appellants cannot invoke it : 1st. Because he has not obtained the order of a judge, and, 2nd, because he has not been satisfied with a proceeding of a purely conservatory nature, but has taken formal conclusions, asking that the seizure should be declared valid in the debtor's absence. This Pigeau, p. 654, distinctly condemns : " La saisie étant faite, si on veut poursuivre, il faut la dénoncer au débiteur parce qu'il peut avoir quelque chose à opposer." 2nd Proposition. 2nd. If the authorities above cited to establish that a *sous seing privé* cannot be opposed to a third party apply, then there is no claim proved, and therefore no privilege can exist. The Appellant cannot fall back on occupation, and invoke the 16th clause of the lessors' and lessees act, for he has not specially set up that he was proprietor of the premises occupied. And moreover this 16th clause, it is submitted, does not mean that whoever occupies a week or a month must occupy a year. Here Berwick occupied and paid up to the 1st Nov. There was an end to his occupation. In the absence of lease Pradjet cannot be connected with Berwick, and therefore it was not Berwick's but Pradjèt's occupation alone which could support the action. 3rd Proposition. 3rd. But all the Appellant's proceedings would have been regular, that still under the circumstances the law denies him the privilege he seeks to exercise. 1 Marcadé, *Priv. and Hyp.* No. 122, after explaining that the landlord's privilege rests : 1st. " Sur la croyance du locateur que tous les meubles apportés dans sa maison appartenaient au locataire. 2nd. Sur l'assentiment tacite ou réel du propriétaire qui en laissant entrer ses meubles dans la maison louée les a soumis au privilège du locateur " ; adds : " Si la réalité des faits est contraire à ces suppositions, le privilège du locateur ne tiendra par parce qu'il n'aura pas sa raison d'être." It is therefore agreed that the privilege does not extend to goods kept in cupboards, &c. " *not in evidence.*" 2. To goods stolen or lost. 3. Te goods which the landlord might have known belonged to third parties. As those sent to workshops to be repaired, &c., as those of boys at College, Rec. Pér., 26, 2, 57. Those consigned to a commission merchant, Rec. Pér., 26, 1, 218. To goods introduced in rooms let as furnished rooms, Rec. Pér. The reasons given for refusing the privilege in the following cases are : In Rec. Pér., 42,2, 236 vo. *Privilége*, " parce que le tableau appartenant à Girardeau n'avait pu servir de gage." Do. In Rec. Pér., 29, 2, 128, " parce que le piano n'était entré que longtemps après l'entrée de Thubault." Tous, says Dalloz Rec. Pér., 41, 2, 132, " s'accordent à limiter le privilége aux choses que le propriétaire a dû naturellement considérer comme une garantie de ses loyers." And this is nothing more than the rule of Pothier, *Louage*, No. 242, *In quantum mea interest non esse deceptum.* And that of Duplessis, *Exécutions*, p. 611 : " Il n'est pas juste que lestiers donnent lieu à tromper le locateur, and that of Guyot, Rép., vo. *Bail.* " Les propriétaires qui ont compté sur les meubles dont les lieux sont garnis ne doivent pas être abusés dans leur espérance, le propriétaire n'a pas dû ignorer que tout ce qui garnit une maison est assujetti au privilége." This is alone reasonable, otherwise we must fall into Bourjon's system, and make the privilege apply to every thing, even stolen goods, &c. In this case, not only did the piano belonging to Respondents only enter in the month of December, 1862, the lease to Berwick dating from May, 1861, but, in November, 1862, Auld allows Berwick to put Fradjet in his place, and, when Pradjet leaves, we find he is allowed to remove his furniture, and Berwick is allowed to do the same as to what he had lent or leased to Pradjet. All parties seem to have speculated upon making a piano which must have been well known to belong to a third party, pay the rent, and not only the rent for December and

January, but the whole six month's rent, which is against all justice or authority, for, says Marcadé, No. 119 : " Ce serait aller au-delà de la juste mesure que d'exiger de ce tapissier qu'il répondît des meubles qu'il m'a loués de tous les loyers à écheoir jusqu'à la fin du bail." On the other hand, in all probability, Laurent and Laforce imprudently and in the hurry of business, rented the piano to Pradjet, not knowing who or what he was, or whether he was a landlord or a tenant. How can it be said that Laurent and Laforce consented that the privilege should extend to the piano. They may have been imprudent, but was not Auld still more imprudent? If a privilege is granted in this case, there is nothing to prevent a landlord after he has deliberately given his house to an insolvent tenant, rather than have none at all, from speculating upon the facility with which such tenant may get furniture from imprudent tradesmen.

NOTE OF EDITOR : The second and third arguments in the above cause in appeal were had before the late lamented Chief Justice LAFONTAINE, and his opinion was in favour of the judgment rendered in appeal.

ACTION EN SEPARATION DE CORPS.—DESISTEMENT.

COUR SUPÉRIEURE, Montréal, 30 avril 1864.

Coram MONK, J.

DUDEVOIR *vs* TURCOT.

Jugé : Que, sur la déclaration faite par la Demanderesse qu'elle se désiste de sa demande en séparation de corps, pour s'en tenir à sa demande en séparation de biens, elle sera séparée quant aux biens seulement de son mari. (1)

La Demanderesse, ayant dirigé une action en séparation de corps emportant séparation de biens contre le Défendeur, son époux, fit le 10 mars 1864, la déclaration suivante : " La " Demanderesse déclare qu'elle se désiste de sa demande en sé- " paration de corps, pour s'en tenir à sa demande en sépara- " tion de biens." Aucun fait de sévices ne fut prouvé, mais seulement des faits touchant la mauvaise administration du Défendeur. Le Défendeur n'ayant pas plaidé à l'action, la Demanderesse inscrivit la cause pour audition au mérite *ex parte*, et le jugement de la Cour est comme suit : " La Cour, vu la déclaration faite par la Demanderesse qu'elle se désiste de sa demande en séparation de corps, pour s'en tenir à sa demande en séparation de biens, ordonne que la Demanderesse sera et demeurera, du jour de sa demande, savoir, le onzième jour de février, 1864, séparée quant aux biens du Défendeur son mari, pour par elle en jouir à part et divis, dépens réservés." (8 *J.*, p. 153.)

LEBLANC, CASSIDY et LEBLANC, avocats de la Demanderesse.
BÉIQUE, avocat du Défendeur.

(1) V. art. 208 C. C.

POSSESSION.—SERVITUDE.—DEPENS.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 8 septembre 1865.

Coram DUVAL, J. en C., AYLWIN, J., DRUMMOND, J., MONDELET, J., et MEREDITH, J.

CHRISTIE, Defendant in the Court below, Appellant, *and* MONASTESSE, Plaintiff in the Court below, Respondent.

Jugé : 1° Que la possession à titre civil d'un héritage en faveur duquel il existe une servitude est un titre suffisant pour jouir de cette servitude.

2° Que, dans l'espèce, le Défendeur ayant nié le droit du Demandeur, les frais doivent être régis par la nature de l'action, et non par le montant des dommages alloués.

Il s'agit d'une servitude, à laquelle la terre possédée par le Demandeur a droit sur celle possédée par le Défendeur. Voici le résumé de la déclaration du Demandeur. Par acte reçu à Verchères, devant Geoffrion et son confrère, notaires, le 7 janvier, 1858, Olivier Bruneau et Adolphe Malhiot, tant en son nom que comme procureur de Charles Malhiot, déclarèrent qu'ils étaient propriétaires, savoir : Olivier Bruneau, d'une terre désignée à l'acte susdit, et Adolphe Malhiot et Charles Malhiot, d'une autre terre aussi désignée au dit acte, et qu'ils n'avaient aucun chemin pour communiquer de leurs dites terres au chemin de la reine. Les parties convinrent, en conséquence, de se transporter un droit de passage sur les terres respectives, et stipulèrent que les ponts et l'entretien des dits chemins de passage seraient à la charge de ceux sur la propriété desquels ils passeraient. Le Défendeur acquit de son côté de F. X. Malhiot et de Rosalie Bruneau, son épouse, la terre chargée de la servitude sus-mentionnée envers la terre cédée au Demandeur. Dans l'acte d'acquisition du Défendeur, les vendeurs déclarèrent ne connaître aucune autre servitude, qu'un droit de passage à pied ou en voiture sur la dite terre en faveur de Pierre Monastesse, le Demandeur. Le Défendeur n'a pas entretenu le chemin en question, de manière à ce que le Demandeur pût y passer convenablement. Les conclusions de la déclaration sont les conclusions ordinaires de l'action *confessoire,* avec une demande de dommages de £100, que le Demandeur prétendait avoir soufferts, en conséquence de la négligence du Défendeur à entretenir le chemin en question. A cette action, le Défendeur a plaidé par une défense en droit qui a été déboutée, et par une exception péremptoire qui contenait les allégués suivants : " Le Demandeur n'a aucun titre à

la servitude. Si telle servitude a existé chez ses auteurs, le Demandeur n'est jamais devenu leur ayant cause relativement à telle servitude, et, de son côté, le Défendeur n'a jamais assumé la charge de telle servitude envers qui que ce soit. Si le Demandeur a droit à une servitude, ce ne peut être qu'à un droit de passage et non à son entretien. Le Défendeur n'a jamais mis d'obstacle au passage du Demandeur sur sa terre. Toute la cause se réduit à deux questions : 1° Le Demandeur fait-il voir qu'il a un titre à la servitude, et quel est ce titre ; 2° le chemin en question a-t-il été entretenu d'une manière convenable ? Question de droit ; question de fait. Le Demandeur fit voir d'abord qu'il avait un titre en vertu des actes produits dans la cause, et prétendit ensuite qu'en supposant qu'il n'en eût pas eu en vertu des dits actes, sa seule qualité de propriétaire de la terre dominante est un titre suffisant." Les autorités suivantes furent citées par le Demandeur à l'appui de ses prétentions. Dorion *et al et* Rivet (1) ; Toullier, vol. 3, *Des servitudes*, tit. 4, ch. 3, p. 499, n° 662 ; *Idem*, même volume, p. 501, n° 665 ; Pardessus, *Traité des servitudes*, part. 1re, ch. 3, sec. 2, p. 85-86-87, n°s 66, 67 ; *Idem*, même traité, part. 1re, ch. 1er, sec. 1, § 3, p. 18, n° 10 ; Nouveau Desgodets, vol. 1, p. 257 ; Domat, *Lois civiles*, vol. 1, p. 329 ; Guyot, *Rep. de jurisprudence*, vbo *Servitude*.

Quant à la question de fait, relative à l'entretien du chemin en question, la cour a jugé que le chemin n'avait pas été entretenu d'une manière convenable, et a ordonné une seconde audition sur la question de savoir si les frais de la cause devaient être régis par la nature de l'action ou par le montant des dommages que la cour jugerait à propos d'accorder au Demandeur. A cette question, le Demandeur répondit que la cour, en accordant des dommages, reconnaissait par là-même son droit à l'entretien du chemin ; que, le reconnaissant, elle ne pouvait l'isoler du droit au chemin ; qu'il est réel comme lui. Le Demandeur n'avait donc pas d'autre moyen de jouir de son droit et de le faire consacrer par la cour que l'action confessoire, et c'est cette action qui doit régir les frais et non point le montant des dommages qui n'en sont que l'accessoire, puisqu'en supposant même que la cour n'accorderait pas de dommages, mais consacrerait seulement le droit du Demandeur,

(1) Le droit de pâturage sur une terre est une servitude réelle qui se transme avec l'immeuble et qui subsiste lors même que l'acte qui l'a créée n'a pas été enregistré. Elle peut aussi être divisée, et, si le propriétaire du fonds dominant acquiert la moitié du fonds servant, ce propriétaire conserve son droit, pour la moitié, sur la moitié du fonds servant. (*Dorion et al.* et *Rivet*, C. B. R., Montréal, 1 juillet 1857, LAFONTAINE, juge en chef, AYLWIN, DUVAL et CARON, juges, cassant le jugement de C. S., Montréal, 29 novembre 1856, DAY, SMITH et C. MONDELET juges, 5 *R. J. R. Q.*, p. 229.)

à l'entretien du chemin, le Défendeur, ayant nié le droit du Demandeur, devait être condamné aux frais.

Ci-suit le jugement de la Cour Supérieure rendu le 30 avril 1864, LORANGER juge : " La cour, considérant que, par l'acte mentionné au libellé de la demande, reçu devant Geoffrion, notaire, le sept janvier 1858, entre René Olivier Bruneau et Adolphe Malhiot, les auteurs des parties, les terres par eux respectivement possédées et décrites audit libellé, ont été chargées d'un droit réciproque de passage, tant à p[illegible] qu'en voiture, dont l'entretien devait être à la charge de c[illegible]n des propriétaires de l'immeuble chargé de ce droit de passage, laquelle charge a constitué une servitude réelle sur l'héritage possédé par Olivier Bruneau en faveur du dit Adolphe Malhiot ou de ses représentants, possesseurs à titre civil du dit héritage et réciproquement sur l'immeuble possédé par Malhiot en faveur du dit Bruneau ou ses représentants, possesseurs du dit héritage, au même titre, laquelle servitude a suivi lesdits héritages en quelques mains qu'ils aient passé ou passeront à l'avenir, jusqu'à son extinction légale ; considérant que le Demandeur et le Défendeur sont possesseurs à titre civil desdits héritages, le Demandeur de celui possédé par Malhiot et consorts, et le Défendeur de celui qui fut possédé par Bruneau, et que, conformément aux droits que lui a conférés ladite servitude et son titre d'acquisition dudit immeuble, le Demandeur a eu depuis sa possession, comme il l'a encor[illegible] droit d'exiger un droit de passage, à pied et en voiture [illegible]aveur de son héritage sur l'héritage du Défendeur à l'entre[illegible]n de ce dernier ; considérant qu'en défense à la présente action intentée pour faire confesser ladite servitude ou droit de passage, et à faire condamner le Défendeur à livrer ce passage et à l'entretenir, le Défendeur a nié la servitude et le droit du Demandeur à icelle ; considérant qu'il est en preuve que le Défendeur n'a point, pendant le printemps et l'été 1863, entretenu le passage ou chemin à pied et en voiture, que le Demandeur avait droit d'exiger de lui, et qu'il a, par là causé au demandeur des dommages s'élevant à dix dollars, et qu'il y a lieu, en sus de cette condamnation à ces dommages, de déclarer et faire confesser la servitude ; a débouté et déboute le Défendeur de ses défenses, faisant droit sur la demande, déclare la terre possédée par le Défendeur chargée d'un droit de passage, à pied et en voiture, à l'entretien du Défendeur, en faveur du Demandeur, ou ses représentants, comme possesseurs civils dudit héritage, condamne le Défendeur à entretenir ledit chemin d'une manière convenable à l'avenir. Et le condamne à dix dollars

de dommages et intérêts civils, le tout avec dépens, &c." (1) La Cour d'Appel a unanimement confirmé le jugement de la Cour Supérieure. (8 *J.*, p. 154 et 1 *L. C. L. J.*, p. 54.)

Sénécal, Ryan et DeBellefeuille, pour le Demandeur.
Doutre et Daoust, pour le Défendeur.

SERVITUDE.—GARANTIE.—RESCISION.

Cour Supérieure, Montréal, 30 novembre 1865.

Coram Monk, A. J.

Christie *vs.* Malhiot.

Jugé : Que la stipulation de la part d'un acquéreur : "de souffrir les servitudes de toute nature qui pourraient exister sur la terre ou en sa faveur, lesquelles tourneront au profit ou à la perte de l'acquéreur, sauf à lui de se défendre de ce qui lui porterait préjudice et à profiter de ce qui lui serait utile, à ses risques et périls, sans aucun recours contre le vendeur, le vendeur déclarant néanmoins ne connaître aucune servitude de l'une ou de l'autre espèce *qu'un droit de passage à pied ou en voiture* sur ladite terre en faveur de Pierre Monastesse, que l'acquéreur sera obligé de souffrir comme susdit," n'empêche pas cet acquéreur de demander la rescision de la vente, ou une diminution du prix de vente, si ce droit de passage est accompagné de la charge de l'entretien, à la connaissance du vendeur, mais non de l'acquéreur.

Jugement : " Considérant que l'acte de vente du 5 Nov. " 1859 porte garantie de tous troubles, dons, douaires, dettes, " hypothèque, évictions, substitutions, aliénations et autres " empêchements quelconques par le Défendeur en faveur du " Demandeur ; considérant que, par ledit acte, le Demandeur " s'est obligé de supporter et d'exécuter les charges et servitudes " suivantes, savoir : de souffrir les servitudes de toute nature " qui pourraient exister sur ladite portion de terre ou en sa " faveur, lesquelles tourneront au profit ou à la perte de l'ac- " quéreur (c'est-à-dire le Demandeur), sauf à lui de se dé- " fendre de ce qui lui porterait préjudice et à profiter de ce " qui lui serait utile, à ses risques et périls, sans aucun recours " contre le vendeur (savoir le Défendeur), le vendeur décla- " rant néanmoins ne connaître aucune servitude de l'une ou " de l'autre espèce qu'un droit de passage à pied ou en voiture " sur la dite terre en faveur de Pierre Monastesse, que l'acqué- " reur serait obligé de souffrir comme susdit ; considérant que, " par l'acte du 7 janvier, 1858, entre René Olivier Bruneau et

(1) Le droit de passage sur un héritage, pour arriver à une enclave qui n'a pas d'autre voie d'accès, est une servitude légale dont il n'est pas nécessaire de produire un titre par écrit, lorsque la jouissance en a duré plus de trente ans. (*Ranger* vs. *Ranger*, et *Valois*, Opposant, C. S., Montréal, 31 octobre 1863, Berthelot, juge, 12 R. J. R. Q., p. 345.)

" Adolphe Malhiot et Charles Malhiot, il est dit et déclaré :
" Que chacun d'eux reconnaissant qu'il serait très-avantageux
" pour Adolphe Malhiot et Charles Malhiot que leur terre eût
" un droit de passage sur la terre de Bruneau pour communi-
" quer au chemin de front du rang de la grande côte, et de
" même qu'il serait très-avantageux pour Bruneau que sa terre
" eût un droit de passage sur ladite terre des dits Malhiot pour
" communiquer à son bois et au second rang, ils se sont
" réciproquement cédé, quitté et transporté, savoir : lesdits
" Malhiot ont cédé et transporté au dit Bruneau qui l'a
" accepté pour lui, ses héritiers et ayants cause, le droit de pas-
" ser sur leur terre, tant à pied qu'en voiture, pour communi-
" quer de sadite terre au chemin du second rang, ledit pas-
" sage devant être à l'endroit qui sera fixé chaque année par
" les dits Malhiot, leurs héritiers et ayants cause, et sujet à
" être changé de place chaque année, à la demande desdits
" Malhiot, leurs héritiers et ayants cause, et Bruneau a cédé et
" transporté auxdits Malhiot qui l'ont accepté pour eux leurs
" héritiers et ayants cause, le droit de passer sur sa terre ci-
" dessus désignée en premier lieu, tant à pied qu'en voiture,
" pour communiquer de leurdite terre au chemin dudit pre-
" mier rang, le passage devant être à l'endroit qui sera fixé
" chaque année par Bruneau, ses héritiers et ayants cause, et
" sujet à être changé de place à la demande dudit Bruneau.
" Lesdits droits de passage étant cédés par chacune des par-
" ties à la charge par chacun des cessionnaires de fermer les
" barrières avec soin, les ponts et l'entretien des chemins de
" passage seront à l'entretien de ceux sur la propriété des-
" quels ils seront. Car ainsi, etc." " Considérant qu'il résulte de cette clause qu'il y avait une servitude active stipulée en faveur de la terre vendue au Demandeur et une servitude passive en faveur de la terre maintenant appartenante audit Monastesse, en vertu de l'acte de vente par Adolphe Malhiot à Pierre Monastesse du 8 janvier, 1856, et que cette dernière servitude consistait en un droit de passage à pied et en voiture, avec l'obligation d'entretenir ledit chemin de passage. Vu qu'il résulte de la preuve produite qu'au temps de la vente du 5 novembre, 1859, le Défendeur connaissait parfaitement la nature et toute l'étendue de la servitude, en faveur de Monastesse, et considérant qu'il était de son devoir d'en faire connaître la nature et toute l'étendue au Demandeur (l'acquéreur dans l'acte de vente du 5 novembre, 1859) et qu'il aurait dû avertir l'acheteur de l'obligation qui existait d'entretenir le chemin de passage. Considérant qu'il ne résulte pas de la preuve produite que le Demandeur connaissait l'étendue de la servitude dont il est question, lorsqu'il fit l'acquisition de ladite terre. Considérant qu'il appert par la preuve que l'entretien dudit

chemin de passage diminue la valeur de ladite terre d'une somme d'au moins trois mille livres, ancien cours, et que, partant, le Demandeur est bien fondé à faire contraindre le Défendeur à opter entre la rescision de l'acte de vente du 5 novembre, 1859, et le remboursement de la somme de $2,750 par lui payée à compte d'icelui et la réduction du susdit prix de vente jusqu'à concurrence de la somme de 3000 livres, ancien cours, égale à celle de $500. Rescinde, annulle et résilie, à toutes fins que de droit, l'acte de vente sus-mentionné du 5 novembre, 1859, et, en conséquence, condamne le Défendeur à payer au Demandeur, sous quinze jours de la signification du présent jugement la somme de $2,750, avec intérêt à compter de ce jour ; si mieux n'aime toutefois le Défendeur payer au Demandeur, sous le délai de quinze jours, la somme de $500, comme réduction du susdit prix de vente, avec intérêt sur icelle à compter de ce jour, et les dépens de cette action auxquels et dans tous les cas le Défendeur est condamné. (1) (10 J., p. 78.)

DOUTRE et DOUTRE, pour le Demandeur.

DORION et DORION, pour le Défendeur.

(1) AUTORITÉS CITÉES PAR LE DEMANDEUR : Solon, *Servitudes*, no. 7 : "Les servitudes sont contraires aux principes de liberté qui dominent nos propriétés *comme nos personnes*, elles sont défavorables, etc., et, dans toutes les questions douteuses, il réclame la solution la plus conforme à la franchise des héritages." *Id.*, no. 53 : "Il est de principe certain que les fonds étant réputés libres, il ne faut apporter à l'exercice du droit de propriété d'autre gêne *que celle que les parties y ont apportées elles-mêmes, d'une manière claire, précise et non-réprouvée par la loi ; le plus petit doute sur la nature de la servitude, son étendue, sur le mode de son exercice doit se résoudre en faveur de la franchise des héritages, etc.*, c'est là, notamment, la règle la plus sûre et la plus généralement invoquée en matière de servitudes." *Id.*, no. 571 : De droit commun l'entretien d'une servitude est à la charge du propriétaire du fond dominant. Ferrière, *gr. cout.*, t. 2, p. 1484, no. 24 : "Il faut déclarer de quelles servitudes le fonds est chargé ; autrement il est présumé vendu sans aucunes charges, *les héritages étant libres de leur nature.* Toullier, t. 3, no 665. Solon, *Servitudes*, p. 39 : "Si l'héritage vendu se trouve grevé, sans qu'il en ait été fait de déclaration, de servitudes non apparentes, (qu'y a-t-il de moins apparent que l'entretien d'un droit de passage ?) et qu'elles soient de telle importance qu'il y ait lieu de présumer que l'acquéreur n'aurait pas acheté, s'il en avait été instruit, il peut demander la résiliation du contrat, si mieux il n'aime se contenter d'une indemnité." Lalaure, *servitudes*, Edition de Paillet, p. 221 : "Et si (le vendeur) connaissant les servitudes dues par son champ, il avait déclaré *d'une manière obscure et confuse, qu'il était dû des droits de passage, mais dans des termes assez ambigus pour que l'acquéreur fût censé n'avoir point compris de quelle espèce de servitude l'héritage vendu était chargé*, il ne pourrait être garant de l'action en éviction, *mais il serait tenu de celle appelée en droit* EMPTI, comme ayant trompé l'acquéreur." Pothier, *Vente*, No. 239 ; Obligation du vendeur de déclarer les charges, à peine de rescision du contrat et de restitution de prix, la fraude donnant lieu à la contrainte par corps, l'absence de fraude donnant également lieu à rescision et restitution, mais sans contrainte par corps, *Idem*, No. 193 : Vendeur doit garantir l'acquéreur de toutes demandes pour raison de charges réelles, autres que celles qui lui ont été déclarées, ou qu'il ne pouvait ignorer. *Idem*, Nos. 204, 210 ; sur l'effet de l'exclusion de garantie dans la stipulation contenue

DECRET.—CERTIFICAT DU REGISTRATEUR.

COUR SUPÉRIEURE, Montréal, 30 avril 1864.

Coram BERTHELOT, J.

HÉBERT DIT LAMBERT *vs.* LACOSTE, *et* JODOIN, Intervenant et Opposant.

Jugé : Que, sur preuve qu'il y a erreur quant au nom du notaire et quant à la date d'obligation mentionnée au certificat du Régistrateur, produit avec le rapport du Shérif sur un writ *de terris*, la cour ordonnera au Registrateur d'amender son certificat en faisant un rapport supplémentaire. (1)

Le 23 mars 1864, Pierre Jodoin, intervenant et opposant contesta le certificat du Registrateur, et, dans ses moyens de contestation, il allégua " que le Registrateur a, par Mignault, " son député, omis de mentionner dans son certificat, par lui " fourni au Shérif de ce district, une obligation consentie à " Montréal, le 23 août, 1842, par le Défendeur, en faveur de " l'Opposant, pardevant Mtre Lappare, pour £87 15s. 2d., " enregistrée, ou s'il a voulu la désigner et mentionner par " celle décrite au numéro deux du certificat, elle y est dési- " gnée et décrite d'une manière informe et incorrecte." Le Régistrateur répondit " que l'obligation mentionnée au nu- " méro deux, au certificat, est correctement désignée, et, en " tout point, conforme au sommaire fourni par le contestant " lui-même." La preuve ayant été faite de l'erreur alléguée par l'opposant Jodoin, dans sa contestation, le jugement de la cour ordonne la rectification de cette erreur et est motivé comme suit : " La cour, après avoir entendu le Demandeur et le mis en cause, aussi bien que le contestant, sur la contestation par lui faite du certificat du Registrateur, du et pour le comté de Chambly, annexé au writ d'exécution, et rapporté le 26 février 1864. Considérant qu'il appert, par la preuve et la pro-

dans l'acte. No. 210 : " Il faut en troisième lieu (pour que le vice de la chose donne lieu à la garantie) que le vice n'ait pas été, par une clause particulière, excepté, de *bonne foi*, de l'obligation de la garantie. Le vice excepté de bonne foi, lorsque le vendeur, *qui ne connait pas* la chose qu'il vend, dans la crainte qu'elle n'ait un certain vice dont il n'a pas néanmoins connaissance, a stipulé qu'il ne garantit pas ce vice. En ce cas la clause doit être exécutée, et l'acheteur n'a aucun recours contre le vendeur pour ce vice, si la chose vendue s'en trouve entachée. *Mais si le vendeur a, lors du contrat, une pleine connaissance de ce vice et qu'au lieu de le déclarer, (ou de n'en déclarer que la partie la moins onéreuse), il stipule qu'il ne garantit pas ce vice ; cette dissimulation du vendeur est un dol qui le rend sujet à la garantie, nonobstant la clause. Idem*, No. 262 : " Il reste à observer que le vendeur est obligé à indemniser l'acquéreur non seulement lorsqu'il a su que la chose n'avait pas la qualité déclarée par le contrat, mais même lorsqu'il a cru de bonne foi qu'elle avait cette qualité. Il en est de même à l'égard de la quantité.

(1) V. art. 738 et 739 C. P. C.

cédure, que c'est par une erreur commune au contestant et au mis en cause, que, le 20 novembre 1843, lors de la présentation au bureau d'enregistrement du comté de Chambly, de l'obligation produite par le contestant le 23 mars 1842, savoir, une obligation du 23 août 1842, reçue devant Lappare et son confrère, notaires, par Joseph Grisé à Pierre Jodoin, pour la somme de £87 15 2, avec hypothèque sur les deux immeubles désignés en ladite obligation, ainsi qu'au certificat du Registrateur, du numéro deux d'icelui, pour y être enregistrée par sommaire, qu'elle fut mentionnée audit sommaire présenté alors, par ou de la part du contestant au mis en cause et reçue par ce dernier, pour enregistrement, et de fait enregistrée, ledit jour, 20 novembre 1843, comme ayant été passée le 23 août 1843, devant L. S. Martin et son confrère, notaires ; ce qui était une erreur seulement, quant au nom du notaire, qui avait gardé la minute de ladite obligation et à la date d'icelle, mais non quant au montant dû par le débiteur qui hypothéquait lesdits immeubles. Et, vu les dispositions du chap. 59 de la 23ème Victoria, sections 8 et 12, et la section 6 de la 25ème Victoria, chap. 25, la cour ordonne audit Thomas Austin, registrateur, d'amender le certificat par lui fait en date du 28 février 1864, en faisant un rapport supplémentaire faisant mention de la présentation pour enregistrement par sommaire de ladite obligation du 23 août 1842, suivant le certificat par lui donné au dos de ladite obligation en date dudit jour, 20 novembre 1843." Le 17 mai 1864, le Registrateur fit un rapport supplémentaire dans les termes suivants : " En obéissance à un jugement rendu par la Cour Supérieure, " siégeant à Montréal, le 30 avril 1864, je, soussigné, Député-" Registrateur du comté de Chambly, certifie que l'obligation " mentionnée au numéro deux de mon certificat filé en cette " cause, et enregistrée par sommaire le 20 novembre 1843, est " une obligation reçue devant Lappare et son confrère, notaires, " à Montréal, le 23 août 1842, pour la somme de £87·15s 2d, " et que c'est par erreur que ladite obligation est mentionnée " dans ledit sommaire comme étant en date du 23 août 1843, " et comme ayant été reçue par L. S. Martin et son confrère, " notaires." (1) (8 *J.*, p. 156.)

LOUIS RICARD, avocat du Contestant.

JODOIN et LACOSTE, avocats du mis en cause.

(1) Le 17 mars 1864, SMITH J., un jugement final fut rendu sur la contestation du Demandeur, après preuve faite et *exparte*, " déclarant et adjugeant " que les hypothèques mentionnées audit certificat sous les numéros 1281, " 1968 et 2565 n'ont jamais existé sur propriété vendue par le shérif en cette " cause," et, en conséquence, la cour : " ordonne et enjoint au prothonotaire " de cette cour de préparer un jugement ou projet de distribution des deniers " prélevés par le shérif en vertu dudit bref, sans avoir égard auxdites hypo" thèques."

DONATION PAR CONTRAT DE MARIAGE.—ENREGISTREMENT.

COUR SUPÉRIEURE, Montréal, 31 mai 1864.

Coram SMITH, J.

AUDET DIT LAPOINTE *vs.* NORMAND, *et* LABOSSIÈRE, Opposante, *et* MAILLET, Opposant-Contestant.

Jugé: 1o. Que l'immeuble, donné par le mari à sa femme par leur contrat de mariage et saisi et vendu sur le mari à la poursuite de ses créanciers, ne peut pas être revendiqué par la femme par sa demande en nullité de décret, par suite et à raison du défaut d'insinuation ou enregistrement de ce contrat de mariage dans les délais prescrits par la loi. (1)

2o. Que, partant, la femme est tenue de faire insinuer ou enregistrer tel contrat de mariage durant le mariage. (2)

Le 19 septembre 1862, Virginie Labossière, l'épouse du Défendeur, produisit une demande en nullité de décret, alléguant que, par leur contrat de mariage, en date du 21 septembre 1851, Brin, N. P., le Défendeur, " en considération de " la bonne amitié qu'il portait à sa future épouse, lui fit donation, en pleine propriété, de la terre saisie et vendue sur le " Défendeur, et que, par la loi du pays et le susdit contrat, et " aussi par le fait du mariage, contracté entre elle et le Défendeur, il a été établi une communauté de biens entre eux et en " vertu du même contrat de mariage l'opposante est devenue la " propriétaire en possession de ladite terre." Elle alléguait, de plus, que le Défendeur avait consenti diverses hypothèques dont il avait grevé cette terre, et ce, illégalement, et l'aurait laissé vendre et décréter sans adopter aucun procédé pour la protection des droits et privilèges de son épouse, et qu'en conséquence elle avait demandé une séparation de biens. L'opposant Maillet contesta cette demande en nullité de décret faite en forme d'opposition, sur le principe que ce contrat de mariage n'a jamais été insinué ès registres des insinuations au greffe de la Cour Supérieure, dans le district de Montréal, dans les limites duquel se trouve situé l'immeuble susdésigné, ni dans aucun autre district. Il alléguait aussi, que le contrat de mariage n'a été enregistré que le ou vers le 12 septembre dernier, c'est-à-dire, après l'expiration des délais prescrits par la loi pour l'insinuation et enregistrement de donation entre vifs et même après la vente et adjudication faite par le Shérif, de l'immeuble susdésigné, en vertu d'un bref d'exécution émané en la présente cause, laquelle vente a eu lieu le dix-sept juin dernier ; que, nonobstant la donation contenue au contrat de

(1) *Vide* S. R. B. C. chap. 37, sec. 29, parag. 2, et art. 807 C. C.

(2) Chap. 37, S. R. B. C., sec. 32.

mariage, le Défendeur a toujours continué à posséder comme propriétaire ledit immeuble jusqu'à l'époque de la vente et adjudication ; que, par suite du défaut d'insinuation et enregistrement de la donation contenue au contrat de mariage, le Défendeur a pu valablement aliéner ou hypothéquer ledit immeuble et la donation est nulle et de nul effet quant à tous les créanciers du Défendeur, porteurs d'hypothèques sur ledit immeuble susdésigné, dûment enregistrées avant ladite vente et adjudication et avant l'enregistrement du contrat de mariage ; que l'hypothèque dudit opposant et contestant sur ledit immeuble remonte au deux décembre 1859 ; que la vente et adjudication dudit immeuble, faite sur le Défendeur, pendant qu'il possédait ledit immeuble et avant l'enregistrement du contrat de mariage, est bonne et valable, et que la demande en nullité de décret par l'opposante est mal fondée." Après audition sur le mérite, la cour a déclaré la femme déchue de ses droits de propriété sur cette terre, lui réservant l'exercice de ses droits hypothécaires s'il y a lieu, et elle a motivé son jugement comme suit : "The Court having heard opposant, Louis R. Maillet, and opposant, Virginie Labossière, upon the merits of the opposition made and fyled by Virginie Labossière ; considering that Virginie Labossière hath failed to establish any right of property in the immoveable sold by the sheriff, on Defendant ; and, further, considering that the donation made in favour of Virginie Labossière, by her husband, under the contract of marriage intered into between them, is altogether of no effect and inoperative, as against all third persons, by reason that the marriage contract was neither *insinué* nor enregistered according to law, anterior to the enregistration of the claim of Maillet. The court doth maintain the contestation of Maillet, to the opposition of Virginie Labossière, *en nullité de decret,* and doth dismiss the same with costs ; leaving to Virginie Labossière, her rights such as they may be declared to be on the subsidiary opposition and conclusions on the distribution of the moneys now before the court according to law." (8 *J.*, p, 158.)

CARTIER, POMINVILLE et BÉTOURNAY, avocats de Dame V. Labossière.

DORION et DORION, avocats de Maillet.

ABUS PREJUDICIABLE A L'AGRICULTURE.—JUGES DE PAIX.

CIRCUIT COURT, Montréal, 30 décembre 1863.

Before LORANGER, Justice.

ST. GEMMES DIT BEAUVAIS, Appellant, *and* CHERRIER, Respondent.

Jugé : Sur appel à la Cour de Circuit d'un jugement rendu par des juges de paix en vertu de l'acte d'agriculture :

1° Que, dans l'espèce, sous les dispositions de cet acte, les juges de paix n'avaient aucune jurisdiction pour décider sur le montant des dommages soufferts

2° Que tels dommages doivent être constatés par des experts auxquels seul le statut a conféré l'autorité requise.

3° Que la Cour sur tel appel prendra connaissance, *ex officio*, de la commission nommant les juges de paix, comme constatant la résidence de ceux qui ont rendu le jugement dont était appel.

LORANGER, Justice : This is an appeal brought under the provisions of the Agricultural Act, (1) from a judgment rendered by two magistrates sitting at Laprairie. By the judgment the Appellant was condemned to pay a penalty for cattle entering on the Respondent's farm, and also to pay certain damages. The chief question raised at the argument was as to whether there is anything on the record to shew that the justices of the peace had jurisdiction, as being resident in the county where the offence was committed. (2) The plea states in general terms that it did not appear that the magistrates had jurisdiction, and that in fact they had none, but it does not state for what reason or ground they had not such jurisdiction. It is to be noticed that the case does not come up on a writ of *certiorari*, but on an appeal ; and I hold there is sufficient before me to shew that the magistrates had jurisdiction and were residents in the county of Laprairie. The session of the magistrates was held "at Laprairie" where the Defendant had his domicile and the offence was committed, and, in addition to this, the writ of appeal was addressed "to "Ludger Ste. Marie et Alexis Moquin, Juges de Paix pour le "district de Montréal, résidents au village de Laprairie." The commission of the peace, as enrolled in the office of the clerk of the peace, is produced here, by which it appears that these justices were residents of Laprairie at the date of the commission, in August, 1863. The judgment being on the 6th November, 1863, I can not assume that the justices had absented themselves from the county between these two dates, and had merely come back to decide the case. On the contrary, I am

(1) Con. Stat. of L. C., ch. 26, reenacted in 1895.

(2) Sect. 38 of the Act.

bound to take official cognizance of the commission of the justices of the peace to the same extent as of the commission of a judge of this Court, or of the attorney general, all of which appear in the *Official Gazette ;* if I do so, there can be no doubt, the magistrates had jurisdiction, and that objection must be overruled. I am of opinion, however, that under the Statute the magistrates could not themselves decide upon the amount of damage, but were bound to name *experts* to report on the damage, and after such report the magistrates could award " to the complainant the amount of damages set forth in the report." (1) The words of the statute, are : " If the Justice has reason to believe that damage has been · one, he shall forthwith order the parties contesting, unless they forthwith arrange the matter in dispute, between them in his presence, each to name an *expert*, and the Justice himself shall appoint a third, and the two others also, if the parties refuse to name them ; the *experts*, if so named, shall proceed as soon as possible to ascertain the damages.... and they shall report in writing to the Justice of the Peace, the conclusions awarded by them in the matter. The Justice of the Peace, after notifying the parties, and having heard them, if present, in favour of or against the report, *shall award to the complainant the amount of damages set forth in the report*, with the costs, &c." I look upon this as imperative and as giving jurisdiction to the *experts* alone to decide on the damages. The justices have therefore exceeded their powers as to the damages, but have not done so as to the penalty. It is for this Court to give the judgment which the Court below should have given, and as there cannot be two final judgments rendered in the some case, I will set aside the judgment and order that an *expertise* be had.

JUDGMENT : " Considérant qu'aux termes de la clause 8eme du chap. 26 du Stat. Ref. du Bas-Canada, il est pourvu à ce que, en matière semblable à la présente espèce, nulle partie ne puisse être condamnée à des dommages si, au préalable, une expertise n'a été ordonnée pour les constater par le ou les juges de paix saisis de litige ; et que cette expertise préalable est aux termes et dans l'intention de statut tellement de rigueur qu'elle ne peut se suppléer par aucun autre mode d'instruction et d'enquête, et qu'un jugement condamnant à tels dommages ne peut avoir de valeur légale qu'en autant qu'il repose sur semblable expertise ; considérant que dans la présente espèce l'Appelant a été condamné sans cette formalité essentielle à la validité de ce jugement, et que, partant, il est entaché d'erreur et doit être cassé ; casse, annulle et met au néant ledit

(1) Sec. 8, sub-secs. 3 et 4.

jugement du 6 novembre 1863, et remet les parties dans le même et semblable état qu'elles étaient immédiatement après la clôture de l'enquête, qui est cependant déclarée ouverte, pour les fins de l'expertise qui sera endossée. Et la Cour, rendant le jugement que lesdits juges de paix eussent dû rendre, ordonne, qu'en la forme voulue par ladite clause 8ème, il sera par lesdits juges de paix ordonné qu'une expertise aura lieu pour constater les dommages si aucuns dommages existent, pour être, sur ladite expertise, rendu tel jugement final que de droit, tant sur ce chef, que sur les autres chefs de ladite plainte, &c. &c. (14 *D. T. B. C.*, p. 82.)

LANCTOT, for Appellant.

DOUTRE, D'AOUST and DOUTRE, for Respondent.

SYNDICS D'EGLISE.—POURSUITE.

COUR SUPÉRIEURE, Montréal, 27 juin 1864.

Coram MONK, J.

DUCHARME *vs.* MORRISSON *et al.*

Jugé: Que, dans l'espèce, les défenses des Défendeurs, syndics à la construction d'une Eglise et Sacristie, ne peuvent être rejetées, sur le principe qu'ils n'ont pas été autorisés par la paroisse à se défendre. (1)

Le Demandeur, ayant actionné les Défendeurs pour le paiement d'une somme de £166 15s 10d, balance du prix stipulé en un marché notarié, intervenu entre lui et les Défendeurs, en leur qualité de syndics pour surveiller la construction d'une église et sacristie dans la paroisse de St-Gabriel de Brandon, ces derniers plaidèrent que, par suite de la défectuosité des ouvrages, l'église et la sacristie menacent ruine, et doivent inévitablement être reconstruites, et ce, aux risques et périls du Demandeur qui, comme entrepreneur, est responsable durant dix ans. Les Défendeurs, à une assemblée, tenue par eux, comme syndics, avaient résolu de se défendre et de repousser l'action du Demandeur. Les parties avaient été entendues sur la défense au fond en droit qui fut renvoyée le 30 avril 1864, et la cause était inscrite à l'enquête pour le 1er juin 1864, lorsque le Demandeur fit, le 22 juin 1864, la motion suivante: " Motion que les défenses produites par les Défendeurs, savoir: *deux exceptions péremptoires en droit perpétuelles et une défense au fond en fait*, soient rejetées de la procédure avec dépens, et les parties rétablies dans le même état où elles étaient avant l'enfilure des dites défenses:

(1) V. art. 19 C. P. C.

1° Parce qu'il n'appert pas par la procédure, et qu'il n'est pas même allégué dans lesdites défenses que la paroisse de St-Gabriel de Brandon ait autorisé les Défendeurs, comme syndics, dans une assemblée régulièrement convoquée et tenue à cet effet, à ester en jugement et à contester la présente demande aux risques et périls de la paroisse ; 2° parce qu'en l'absence de telle autorisation, les Défendeurs n'ont pas qualité pour se défendre à la présente action, et en faisant une contestation outrepassent les pouvoirs à eux conférés par la loi ; 3° Parce que, malgré plusieurs tentatives faites par les syndics pour se faire autoriser par la paroisse, elle s'est refusée, dans plusieurs assemblées, de contester la réclamation du Demandeur ; 4° Parce que le Demandeur, ayant cru de bonne foi jusqu'après la contestation liée, que les Défendeurs étaient régulièrement autorisés par la paroisse, et n'ayant appris, que postérieurement à la contestation, que tel n'était pas le cas, comme il appert à son affidavit produit, il a droit de recourir au présent moyen pour sauvegarder ses intérêts et obtenir justice."

R Roy : Les syndics ont, par le chap. 18, sec. 16, des Statuts Refondus du Bas-Canada, des pouvoirs limités qu'ils ne peuvent outrepasser ; ils sont délégués par la paroisse pour surveiller la construction des églises et presbytères, faire la cotisation et la prélever, mais ils ne sont pas autorisés à ester en jugement, et ne peuvent, en plaidant, lier la paroisse qu'ils ne représentent pas, s'ils n'y ont été spécialement autorisés dans une assemblée légalement convoquée et tenue. Cela est conforme à ce qui se pratiquait en France sous l'ancien droit ; l'on sait que les syndics ou administrateurs de paroisses, communes ou autres corps, ne pouvaient plaider en jugement sans autorisation. Fréminville, Communauté d'hab., p. 202 à 206 ; Pigeau, 1, p. 79 et 84 ; Lacombe, Rec. de Jur., vo. Commun. d'hab., p. 119, ce dernier cite Néron, 2 nota ; Jousse, Paroisses, p. 173-226. Il est vrai que cette motion aurait dû être régulièrement faite après l'enfilure des défenses, mais le Demandeur produit un affidavit constatant qu'il a ignoré, jusqu'après la contestation liée, que les syndics n'étaient pas autorisés par la paroisse, et que c'est un des syndics lui-même qui lui a annoncé qu'ils avaient convoqué des assemblées pour se faire autoriser, mais que la paroisse s'y était refusée.

LaFrenaye, pour les Défendeurs : Les syndics ont produit une résolution par eux prise en une assemblée par eux tenue le 16 avril, 1864, par laquelle ils ont déclaré qu'ils entendaient résister à la demande du Demandeur et contester son action. Dans le cas où, plus tard, la paroisse, en recevant leur compte, serait justifiable à leur opposer le défaut de l'autorisation des habitants, les syndics seraient tout au plus responsables per-

sonnellement des faux frais occasionnés par leur contestation, dans le cas où elle serait considérée mal fondée. Ceci n'intéresse aucunement le Demandeur qui ne peut être reçu à exciper du droit d'autrui. Ce défaut d'autorisation par la paroisse n'emporte pas nullité de la procédure et du jugement rendu en conséquence, car ce n'est pas, en Bas-Canada, une nullité d'ordre public, comme cela existe maintenant en France pour les Communes. Bioche, vo. autorisation, commune, action. (1) En sorte que le jugement que le Demandeur obtiendra, si sa demande est jugée bien fondée, pourra toujours être rendu exécutoire tant contre les syndics que contre la paroisse et, conséquemment, il n'a aucun intérêt à faire rejeter les défenses des Défendeurs.

PER CURIAM : After an examination of the authorities referred to, the Court does not think that this would be considered a matter *d'ordre public* under the old law of France. It is a matter of discretion with the Court whether the motion should be granted or not. The affidavit is not sufficient to justify the granting of the motion and, besides, the Court does not consider itself justified by any peremptory law in rejecting the Defendants' pleas. Take nothing by motion. (8 *J.*, p. 160.)

R. ROY, avocat du Demandeur.

LAFRENAYE et ARMSTRONG, avocats des Défendeurs.

ASSURANCE.—SURRENDER OF POLICY.—ADVANCES.

SUPERIOR COURT, Montreal, 30th April, 1864.

Coram SMITH, J.

CONWAY, EXECUTOR, *vs.* THE BRITANNIA LIFE ASSURANCE COMPANY *et al.*

Held : 1st. That the Plaintiff, as executor to a deceased person, whose life had been insured, being unable to surrender the policy of insurance to the insurance company, inasmuch as said policy had been transferred

(1) En France, sous l'ancien droit, les seules lois en force sur la matière étaient : l'Edit du mois d'avril 1683, la Déclaration du 2 août 1687, et du 2 octobre 1703 (qui n'avaient pas été enregistrés au Conseil Supérieur de Québec) et qui exigeaient une autorisation des habitants pour intenter poursuites, à peine de nullité de la procédure et des jugements ; car il est dit : "Faisons "défense aux premiers juges de rendre aucun jugement sur les affaires qui "concernent les dites communautés, qu'il ne leur soit apparu de la délibéra- "tion des habitants, à peine de nullité des procédures et des jugements ren- "dus en conséquence." Plus tard, par l'arrêt du Conseil d'État du 8 août 1713, Sa Majesté avait étendu "toutes les formalités prescrites par les décla- "rations pour les procès dans lesquels les communautés" d'habitants "sont "Demanderesses à tous ceux qui pourront leur être faits où elles seront *Dé- "fenderesses.*"

to cover all advances then made, and which might thereafter be made by a third party, can have no right to claim the benefit of said policy, so long as the claim of such third party in possession of said policy remains in dispute and unsettled.

2nd. That the settlement of such claim involves two separate and independent issues, which cannot be joined in the same action.

The judgment is as follows: "The Court, having heard the parties upon the merits of this cause, seen the consent and declaration of *The Britannia Life Assurance Company*, declaring *qu'elle s'en rapporte à justice.* Considering that Plaintiff hath failed to shewn any right of action against the Britannia Company Plaintiff, in his capacity, not being the holder of the policy of insurance declared in the declaration; and, further, seeing Walsh, in his lifetime, had assigned and transferred over to Francis Martin the said policy, for a good and valid consideration, and that Martin became thereby and was the legal holder of the policy under the conditions of said assignment; and, further, considering that authority is expressly given by Walsh to Martin to collect the amount of the insurance stipulated for in the policy to cover all advances then made and which might thereafter be made by Martin to Walsh, with an undertaking on the part of Martin to pay over any balance which might be found to be due and owing to Walsh on the payment of the full claim of Martin, and which claim remains now in dispute and unsettled; and, further, considering that, until the settlement of this claim of Martin, Plaintiff, in his capacity, can have no right whatever to claim the benefit of the policy, or obtain the possession of the policy to enable him to claim any right under it from the Britannia Company; and, further, considering that Martin cannot be held or bound to deliver up the policy, or part with his interest therein, until full and complete payment of all advances, which may be found to be due and owing to him according to the terms of the assignment; and, further, considering that the Britannia Company, cannot be compelled to pay the amount of the insurance, or any part thereof, except on surrender to the company of the policy, and seeing that Plaintiff, in his capacity, cannot surrender the policy to the Company, as Martin is in truth the legal holder and proprietor thereof, subject to the conditions contained in the assignment; and, further, considering that the settlement of the claim of Martin, for which the policy was pledged as security and claim for the recovery of the amount covered by the policy, involve two separate and independent issues which cannot be joined in the same action, not being between the same parties, and that no judgment can be rendered in this cause by reason thereof; and, further, considering that Mar-

tin, whose rights are secured by the assignment of the policy, cannot be called on to surrender the policy, except on payment of his claim ; and considering that Plaintiff, in his capacity, has not offered to pay the same or otherwise fulfil his obligations in respect thereof. The court doth dismiss the action of Plaintiff, with costs." (8 *J.*, p. 162.)

A. and W. Robertson, attorneys for Plaintiff.

Griffin, attorney for the Britannia Life Assurance Company.

Torrance and Morris, attorneys for the said Defendant, Francis Martin.

ACTION POSSESSOIRE.—BORNAGE.

Cour Supérieure, Montreal, 30 avril 1864.

Coram Smith J.

Lalonde *vs.* Daoust.

Jugé: Que l'action possessoire ne peut être maintenue pour voies de fait sur des propriétés contigües et non délimitées par suite de l'incertitude de la possession respective des parties et que, dans ce cas, elles seront renvoyées au pétitoire ou à l'action en bornage. (1)

Action en complainte de la part du Demandeur et demande de dommages au montant de $250 pour voies de fait. Les défenses allèguent une possession contraire de la partie ou lisière de terre sur laquelle le Demandeur prétend avoir été troublé. Après une preuve contradictoire de part et d'autre, la cour a rendu son jugement comme suit : " The Court, considering that Plaintiff hath failed to prove any separate and distinct possession, by well defined and fixed bounds or metes on the property on which the alleged trespass is said to have been committed, by reason of which an action *possessoire* will lie ; but, considering that the properties of Plaintiff and Defendant are contiguous to each order, and are not separated by visible and clearly visible *limites* or boundaries, and that the proof of possession by Plaintiff, or by Defendant, is not evidence of such a possession as can give rise to an action *possessoire* from its vagueness and uncertainty. The court doth leave the parties to their rem[illegible] *pétitoire* or *bornage*, as they may be advised, and doth dismiss this action, but, without costs." (8 *J.*, p. 163.)

Dorion, Dorion et Sénécal, avocats du Demandeur.

Leblanc et Cassidy, avocats du Défendeur.

(1) V. art. 946 C. P. C

PENAL ACTION FOR VOTING ILLEGALLY AT AN ELECTION.

CIRCUIT COURT, Montreal, 30th April, 1864.

Coram BERTHELOT, J.

PERRY *vs.* ADAMS.

Held: 1st. That a person who wilfully votes at an election for a member of Parliament, without possessing all the qualifications required by law, will be condemned to pay the sum of forty dollars and costs to any one who may sue therefore as in an action of debt, and will be *contraignable par corps*, in default of payment within the period to be fixed by the Court, under the Consol. Stat. of Canada, cap. 6.

2nd. That the fact of the Defendant, in such an action, having obtained a legal opinion of qualification to vote, will not, of itself, absolve him from the penalty imposed on one who wilfully votes without having all the qualifications required by law for entitling him so to vote.

3rd. That the certified copies of poll books deposited, as required by the above mentioned Statute, with the Registrar of the county, are valid and sufficient evidence, in Courts of Law, of the votes mentioned in them having been polled. (1)

4th. That an action brought as above against a person for wilful voting without qualification is an action of debt, and subject to the rules governing such actions and, consequently, a Defendant is bound to answer upon *faits et articles.*

This suit was brought under the elections act, (Consol. Statutes of Canada, cap. 6,) to recover from Defendant the sum of forty dollars alleged to be due to Plaintiff, under the provisions of that act, as complainant against Defendant, for having, at the election for a member of Parliament for the electoral division of Montreal Centre, held on the 8th and 9th June, 1863, wilfully and knowingly, voted without the necessary qualifications, he being an alien. The declaration concluded for *contrainte par corps* against Defendant, in default of payment. The Defendant pleaded, besides the general issue that he had good reason to believe himself, and that he was in fact entitled to vote. The evidence for Plaintiff consisted of the certified copies of the poll books deposited as required by law with the registrar of the County, which contained Defendant's name and vote, and which were brought up by the registrar and proved to be true copies by the returning officer for the division, by whom the copies were made and certified according to law. The fact of Defendant's having voted was also established by his answers on *faits et articles*, which contained an admission of the fact, but coupled with the statement that he acted under legal advice in doing so. It was proved, by the deputy returning officer, who held the poll at which Defendant voted, and by a witness present on the occasion, that, before his vote was entered, the necessary qualifi-

(1) V. art. 1203 C. C.

cations were explained to him by the deputy returning officer and that he then deliberately voted. On the part of Defendant, it was proved that a lawyer, in the committee room of the candidate for whom Defendant voted, told Defendant that he was a good voter. The same witnesses proved the voting. A certificate, under the hand of a justice of the peace., that Defendant had taken the oath of allegiance, was also produced. An objection was raised during the examination of Defendant on *faits et articles* to his obligation to answer the question whether he had voted or not, on the ground that the action was a penal one, and that Defendant could not be compelled to give an answer which might criminate himself. The Court overruled this objection, considering the action to be one simply of debt; a further objection was also raised to the acceptance of the copy of the poll-books instead of the originals which was reserved. The Defendant's counsel, however, afterwards admitted the fact of the voting with the qualification attached to it in Defendant's answer.

J. L. MORRIS, for Plaintiff, submitted that the case was one of debt, the statute requiring only an allegation of indebtedness for specified reasons; and that the sole point which it was incumbent on Plaintiff to prove was the fact of Defendant's having voted. By the statute, the burthen of proof was on Defendant to shew that he was qualified. The copies of the poll-books produced were not unauthorized copies; they were made directly under the requirements of the law by the public officer, and, by the same authority, were placed in the keeping of another public officer, evidently to be resorted to for the purposes of justice. Their correctness, in this case, was not even assumed, but was testified to on oath by the officer who made them. In addition to this, they had the evidence of the deputy returning officer and of another witness, to say nothing of Defendant's own witnesses, who proved that Defendant did vote and, beyond this, Defendant's admission on *faits et acticles*. The Plaintiff contended that the subsequent modifying clause in Defendant's answer should not be admitted. He was asked if he voted; he admitted he did, and the remainder of the answer was in avoidance of the consequences of his admission, and could not destroy its weight. In support of this point, MORRIS cited Ord. 1667, art. 8, note to art. 8; *Heaviside* vs. *Mann*. (1) Taking then the fact of voting as established, what proof did Defendant make to show that he was qualified, or that he had good reason to suppose he was? The vague statement of a witness who heard a lawyer tell

(1) **Une partie ne peut être interrogée de nouveau sur faits et articles relatifs aux mêmes faits. (*Heaviside* vs. *Mann*, C. B. R., Québec, 1817, 1 R. J. R. Q., p. 299.)**

him that he was a good voter. Why was the lawyer not produced to say on oath what information was given him on which to base his opinion? The Defendant had not attempted to show that he had been in this country three years, before which period of residence he could not, under any circumstances, have a right to vote. At all events, the irresponsible *dictum* of a lawyer (not named) could have no weight, in face of the fact that the law was explained to Defendant officially, by the deputy returning officer, and that, in spite of such explanations, and knowing that he did not fulfill the conditions of the law as so explained, he voted. For it is to be supposed that, if he had satisfied the requirements of the law, some proof of his having done so would have been made. The rule of law was that "*ignorantia legis neminem excusat,*" and it behoved Defendant to make out a very strong case of reasonable belief that he was entitled to vote, to protect him from the consequences of what was undoubtedly an illegal vote. This he had failed to do and he became liable towards Plaintiff in the sum demanded.

W. W. Robertson, for Defendant, contended that the law evidently required a wilful false vote, in order to subject the voter to the penalty, and that, if a reasonable ground of belief were shown, the voter must be held harmless. In this case, Defendant voted (for the fact of voting could not be denied) after obtaining the certificate of a justice of the peace, and being legally advised that he was entitled to vote. The law of elections was not so simple that no error could be made in interpreting it; and there was no doubt that, on many points, conflicting opinions were held by our leading lawyers. The law, as laid down at the poll, was not an authorized interpretation: it was (as proved by the returning officer who gave the memorandum to each of his deputies) the written opinion of one legal gentleman, from which his *confrères* might very possibly differ; and, as it had been shown that Defendant did act under the advice of a lawyer, it would be exceedingly hard to require him to discriminate between the merits of different legal opinions. If he was legally advised, he was entitled to the presumption that he acted in good faith, and should be absolved from the penalty which the law plainly attached only to wilful false voting.

Berthelot, J., in rendering judgment, said he entertained no doubt as to the merits of the case. The fact of voting having been clearly established, which it had been not only by the certified copies of the poll-books, but by the evidence of witnesses on both sides, and by the answers of Defendant on *faits et articles*, Defendant was bound to show that he was legally qualified, or had good reason to believe himself so. This he had failed

to do. There was no proof whatever of qualification, even the preliminary requirement of a residence of three years in the Province not having been made out. The proof as to his having formed his belief of qualification under a legal opinion was indefinite; but, in any case, it was his duty to make himself acquainted with the law on this subject, the more especially as he had already received a warning at the poll, and if he took professional advice, he did so at his risk. It would never do that a foreigner who might but lately have come into the country, and who did not take the trouble to ascertain his rights, should, by merely getting some professional man to tell him that he had a vote, be absolved from the charge and consequences of having wilfully voted without qualification. That would be to lay open the poll-books indiscriminately to all comers. With regard to the objection raised by the Counsel for Defendant to Defendant's being asked on *faits et articles* if he voted or not, on the ground of its tending to make him criminate himself, the Court was of opinion that the action granted by the statute was simply one of debt, and that the rules of evidence applicable to ordinary cases of debt were in force here. As to the validity of the copies of the poll-books deposited with the registrar to prove the fact of a vote having been given, the Court considered that the chief object in view by the legislature in requiring the copies to be so deposited was, that they might be obtainable and used for the purposes of justice, without its being necessary to have recourse to the originals in the keeping of the Government. Judgment for Plaintiff in the terms of his conclusions, with *contrainte par corps* against Defendant in default of payment. (8 *J.*, p. 165.)

J. L. MORRIS, for Plaintiff.

A. and W. ROBERTSON, for Defendant.

ACTION REDHIBITOIRE.—VICE CACHE.

COUR DE CIRCUIT, Montréal, 30 avril 1864.

BERTHELOT, J.

DUROCHER *vs.* BONE, *et* E. CONTRA.

Jugé: Que, par suite des délais écoulés depuis l'échange de chevaux entre les parties, la garantie stipulée de la part du Demandeur n'entraîne pas la résolution, mais donne lieu seulement à une diminution du prix. (1)

JUGEMENT: " La Cour, considérant que l'échange mentionné " dans la déclaration et les plaidoyers a eu lieu entre les parties

(1) Vide 1 Troplong, Vente n° 533; 2 Troplong, Vente nos. 586 et 590; Loysel, liv. 3, titre 4, no. 17; art. 1526 et 1530 C. C.

" le dix juin 1861, avec garantie de la part du Demandeur que
" le cheval brun qu'il donnait en échange au Défendeur, était
" exempt de tout défaut et n'avait pas de maladie cachée. Con-
" sidérant qu'il est prouvé qu'au jour de l'échange le Demandeur
" savait que son cheval était attaqué ou sujet au *tic* ou *rot*, vice
" ou maladie cachée dont le Défendeur ne pouvait s'apercevoir,
" et que sa valeur en était de beaucoup moindre, et que, bien
" que le Défendeur ne puisse, dans les circonstances de la cause,
" et après les délais qui se sont écoulés entre le 10 juin et le 27
" octobre 1862, demander la résiliation de l'échange, il peut né-
" anmoins, vu la garantie qui lui a été faite du cheval, comme
" exempt de tout défaut, être admis à faire valoir, à l'encontre
" de la demande, la diminution de la valeur du cheval, à raison
" du *tic* ou *rot*, ou maladie dont il était attaqué ; et considérant,
" enfin, que, d'après la preuve, cette valeur doit être fixée à $100,
" sur lesquelles déduisant les $10 payées et la valeur de la ju-
" ment du Défendeur à $30, il reste $60, a condamné le Défen-
" deur à payer au Demandeur cette dernière somme avec inté-
" rêt depuis le 20 juin 1861, et les frais comme dans une action
" au-dessous de $30, et renvoie la demande incidente, sans frais.
(8 *J.*, p. 168.)

LORANGER et LORANGER, avocats du Demandeur.
DRUMMOND et BÉLANGER, avocats du Défendeur.

SAISIE CONSERVATOIRE.—PROCEDURE.

SUPERIOR COURT, IN CHAMBERS, Montreal, 2nd July, 1864.

Coram MONK, A. J.

DUCHESNAY *et vir vs.* WATT.

Held: In the case of a *saisie conservatoire*, under the 176th art. of the custom of Paris, of a quantity of wheat on board a vessel, in the port of Montreal, that the court can authorise the removal by the sheriff of flour stowed above the wheat, to such an extent as to admit of the proper seizure of the wheat. (1)

This was a petition by Plaintiff, setting forth that the sheriff, who was directed, by a writ of *saisie conservatoire*, to seize a quantity of wheat, on board a vessel, in the port of Montreal, was unable to effect the seizure, in consequence of a number of barrels of flour being stowed over the wheat, which the captain of the vessel refused to allow the sheriff to remove, and praying that the sheriff be authorized to remove the flour, to such an extent and in such a manner as to enable him to effect the seizure of the wheat.

(1) V. art. 560 et 841 C. P. C.

MONK, A. J.: This is an application by Plaintiffs, based upon an interim return of the sheriff, charged with the execution of a writ of *saisie conservatoire.* It appears, by the return, that serious obstacles to the execution of the writ exist, and the prayer of the petition is that the sheriff be authorized by a judge in chambers to remove and overcome the obstacles. As the case thus presented is of considerable importance, and may result in very serious consequences not only to the parties immediately concerned, but also to the course of trade in one respect, it may be proper that I should state at somme length the grounds upon which my decision will rest. The nature and the extent of my authority over the suject matter submitted for my determination must in the first place be carefully considered. I sit here in a simply ministerial capacity and I am called upon, in so far as this petition claims the exercise of my authority, to perform exclusively a ministerial, that is. to authorize the sheriff to remove obstacles of an unusual character, and to overcome illegal resistance to the execution of the Queen's writ. The law and the very necessity of the case empower me, exercising ministerial functions, to give such an order, to confer the required authority on the sheriff. But, beyond the strict limits within which this ministerial authority is legally exercised, I cannot go. I can adjudicate upon no claims, I can determine no rights. I cannot suspend, modify, or restrict the execution of any process or order of the court. I can order no specific thing to be done in a case like the present, and upon an application such as the one presented. Bearing this in mind, I have next to enquire whether the obstacles presented to the execution of this writ are of a nature to require and justify the intervention of my authority, or whether the officer charged with the process in question should not be left to act upon his own responsibility, to desist from any further proceedings in the matter, or to take upon himself the duty of removing the obstacles of which he complains. The Plaintiffs here are prosecuting certain rights in virtue of a precise and particular law, which undoubtedly authorizes them to take the proceedings they have adopted, and I find, moreover, that the course they have taken is, so far as I can judge, regular and in strict conformity to the regular procedure known to this court and followed in like cases. The 176th art. of the custom of Paris authorizes the vendor of movable property for cash, or with the expectation of prompt payment, to follow the thing sold wherever he may find it, if the purchaser fail to pay as agreed; and the proceeding usually adopted in such case is the *saisie conservatoire,* the particular description of writ issued in this case. The sheriff is ordered to seize a certain quantity of

wheat on board the ship the "Moss Rose," lying in the port of Montreal, in the possession of Defendant Watt. That is, as I read it, to seize a certain quantity of wheat in the possession of Watt, on board the above named vessel. This writ was issued upon the affidavit of one of the Plaintiffs, disclosing the circumstances which justified the issuing of the process, and the order for its execution was signed by one of the judges of this court. So far all is plain and undoubtedly regular, here is a legal right and a lawful remedy sought to be enforced in a legal and lawful manner. If I saw anything manifestly defective in these proceedings, or plainly preposterous in Plaintiff's pretensions, if there was apparent, upon the face of these documents, capital blunders or manifest and fatal irregularities, rendering the whole proceeding evidently null, I should probably give no such order as that asked for. This, however, is not the case, but precisely the reverse. The sheriff returns that he cannot execute the writ, because there is a large quantity of flour lying over the wheat, in the hold of the vessel, and that the captain will not allow him to remove this flour, and Plaintiffs thereupon pray that the sheriff be authorized to take measures to remove the flour, notwithstanding the resistance on the part of the captain. This is a very proper precaution on the part of the sheriff. He would not be justified in acting upon his own authority and responsibility in such a contingency. For a variety of reasons to which it is not necessary to advert, he should be armed with the power asked for him. This being the case, it is clearly my duty to give him this power unless there exist grounds for withholding that authority. Now, this application has been informally resisted by the master of the ship and by third parties, holding bills of lading of the wheat in question. No petitions have been presented by these parties, probably none could be at this step of the proceedings. They have come before me with affidavits and verbal statements, setting forth certains facts intended to show that the possession of the wheat is not now in Defendant Watt, but is either in the master of the vessel, or the banks holding the bills of lading. This question of possession is one to which the parties attach great importance, and on which they mainly base their opposition to the granting of this order. Now, it is quite impossible for me to take the contents of these affidavits into considerations. There is no petition or other proceeding taken, to which the facts thus disclosed will apply, or in support of which they can be received. There is no prayer on their behalf, no issue joined before me. I would not be justified in acting upon affidavit such as these, or upon mere verbal statements without any written formal demand being submitted to me, even

if I were here exercising judicial authority. But, assuming that I could do so, there is nothing in these affidavits or in the statements and arguments of counsel, to warrant my suspending the execution of this writ, or withholding this authority from the sheriff. The master says in his affidavit, that the wheat is on board his ship a very important fact for Plaintiffs, and that he is credibly informed that the bills of lading, granted by him to Watt, have been assigned to King, manager of the Bank of of Montreal, and to the Bank of Upper Canada. The latter institution has produced an affidavit to show that it holds a bill of lading, and that advances have been made upon it. I assume this to be the case, both with respect to this bank and the Bank of Montreal, and that the bills were taken and the advances made in perfect good faith and legally, on the part of both the banks. I have now to enquire whether there is enough in all this to establish that Watt had been divested of the possession of the wheat. With regard to the captain, if Watt be still the legal owner and possessor of the grain, subject to the banks' lien, he possesses for Watt; his possession in the eye of the law is Watt's possession; it has been delivered to him as a common carrier, and at the end of the voyage it will be delivered on Watt's order. The wheat, therefore, cannot be said to be in the master's possession in a sense to defeat the execution of this writ. But it is contended, that the banks are the legal owners and possessors of the wheat under tne bills of lading. It is quite true that, under our Statute law, and particularly, in virtue of the statute 25 Vic. cap. 23, bills, receipts, specifications, &c., transferred to banks making advances upon them, carry a *lien* for the full amount of the advances made upon the property, and the banks are preferred over the unpaid vendor. So far this law is clear and precise; but does the clause of the statute creating the *lien* also transfer the ownership and possession to the banks, or does it merely give them a preference upon the proceeds to the extent of their advances? As to the ownership of the property, it plainly does not transfer it. Whatever may be the effect of the transfer of a bill of lading at Common Law between individuals and commercial firms, it has no such effect when made to banks, unless the statute authorizing their taking such security gives such an effect to the assignment. Now, our Statute only gives a *lien*, but does it give possession? If so, then the captain's possession is the possession of the banks, and Watt being no longer the possessor, it is argued by RITCHIE, counsel for the Bank of Upper Canada, that the sheriff is invading his client's possession, that the sheriff is a trespasser and may be legally resisted, and hence

this order should not issue. Now, grave doubts may reasonably exist, and do exist, as to whether the legal possession of property is transferred by assignment of bills of lading to the banks under the clause of the statute, giving them a *lien* for their advances. The law does not say that possession follows the bill of lading, and this law is the banks' sole authority for holding such bills as preferential security. But this possession may be implied. A *lien* upon movable property under the Common Law supposes possession in fact, and under that law possession is essential. But here there exists a doubt, possession is not necessary, the statute gives the *lien*, and that will exist without actual possession. It may be, as said before, that the banks are entitled only to rank by preference upon the proceeds to the extent of their advances ; their particular rights are the creation of the statute ; they do not result from the Common law. There may be a conflict between the article of the Custom and the provisions of the statute. If so, and if a bank holding a bill of lading has no control whatever over the property on which its *lien* exists, the sooner the law is changed the better. As it is it is not a very clear law ; but even if it was more so, I am not authorized, I have no power sitting in chambers to decide that question. I cannot determine who is owner or who is possessor of this property. To stop this writ, I should have so to decide. I should be obliged judicially to determine the validity and effect of a bill of lading held by the bank, and this plainly cannot be. But let us pass from these considerations to others of a more general character. It is easy to suppose a case where bills of lading might be granted in fraud of the first vendor, who might show before the court, when the case came up for pleading and evidence, that the bill of lading was fraudulent; that the party assigning the bill was a bankrupt ; that the bill was transferred to meet old liabilities, and effect fraudulent preferences, or that the bill was granted before the grain was on board the vessel ; in fact, the existence of circumstances which would render the bill of lading utterly null and void as against the first vendor. In such a case, what a flagrant injustice would be perpetrated, if sitting here I arrested the execution of the writ, or if I did what was equivalent to it, if I refused such an order as that required in this case, simply upon the exhibition of a bill of lading, and a bill of lading which might be wholly inoperative against the Plaintiff. Such a course would constitute a most dangerous precedent. I would be lending my authority as a judge to aid the perpetration of a fraud. This cannot be. If the rights of holders of bills of lading are to be respected, the claims of the first vendors are entitled to an equal measure of protection, in so far as the law affords that protection. The sheriff has made a supplementary return,

by which it appears that the Bank of Montreal has served upon him and also on Plaintiffs, a protest intimating that they held a bill of lading of the wheat from Watt, and warning him not to proceed with the seizure. But the same remarks apply to this protest as were made in reference to the affidavits and verbal statements. I cannot interfere with Plaintiffs' course of proceeding, they are assuming a very great, a very grave responsibility, and it is difficult to see with what object unless these bills of lading were illegally or fraudulently taken by the holders. They must, however, be supposed to know their own interest and their own business best, it is theirs, not mine. Something has been said by DEVLIN, about the illegality of touching other people's property, and the danger to the ship and cargo by removing this flour. There are five or six affidavits to show that the flour would be greatly injured, and the ship perhaps sunk in case of removal of the flour. There are six other affidavits of stevedores to establish the very reverse. If I am bound to give this order at all, I must do so wholly irrespective of these considerations. The Plaintiffs assume all the responsibility. The sheriff is ordered to take every precaution in removing the flour, and I have no doubt he will do so, he is moreover, ordered to replace it after the wheat is removed. This petition for these reasons must be granted with this caution to the sheriff. Petition granted. (8 *J.*, p. 169.)

STRACHAN BETHUNE, Q. C., for Plaintiffs.
B. DEVLIN, (in interest of captain of vessel).
ANDREW ROBERTSON, Q. C. (do.)
T. W. RITCHIE, (in interest of Bank of U. C.).
Opposing as *Amici Curiæ*.

CONTESTATION DE LISTE ELECTORALE.

COUR SUPERIEURE, Montréal, 15 avril 1864.

Coram SMITH, J.

Ex parte DENIGER *et al.* Appelants, *et* LA CORPORATION DE LA PAROISSE DE LAPRAIRIE, Intimée.

Jugé : Qu'en conformité aux dispositions du chapitre 6, des Statuts Refondus du Canada, section 14, la cour, sur requête de la partie lésée, après une enquête contradictoire, suivant les errements de la procédure ordinaire, ordonnera au secrétaire-trésorier d'inscrire le nom de telle partie lésée sur la liste électorale, et ce avec dépens contre la corporation.

Les Appelants, par leur requête présentée le 3 juin 1863, exposaient, qu'ils " possèdent la qualification requise par la

loi pour voter aux élections des membres du conseil législatif et de l'assemblée législative de cette province, soit comme *propriétaires*, ou *locataires*, ou *occupants ;* que, le 26 mai courant était le jour fixé par le conseil municipal de la paroisse de Laprairie pour la revision du rôle de cotisation et de la liste des personnes qui, d'après la loi, ont droit de voter aux élections des membres du conseil législatif et de l'assemblée législative, faits lesdits rôles et listes d'après les exigences de la loi, et que, dans les délais voulus, vos requérants dont les noms n'étaient pas et ne sont pas encore sur ladite liste d'électeurs, ainsi que quelques autres personnes, ont déposé une plainte entre les mains du secrétaire-trésorier du conseil, par le ministère de André Bétournay, un des dits électeurs, demandant l'insertion de leurs noms sur la liste et exposant leurs raisons ; que le conseil, s'opposant à toute preuve de la part de vos requérants, a, là et alors, rejeté la plainte et refusé d'entrer leurs noms sur la liste d'électeurs ; que vos requérants sont tous qualifiés, aux termes de la loi, pour voter aux dites élections, et qu'ils ont droit d'être portés comme tels sur la liste d'électeurs et que le conseil, en refusant d'entrer leurs noms sur la liste, a commis une grande injustice envers eux. Vos requérants supplient cette honorable cour vouloir bien ordonner que leurs noms soient insérés sur la liste d'électeurs pour la paroisse de Laprairie, et que cette liste soit corrigée en conséquence par le secrétaire-trésorier du conseil qui en a la garde, immédiatement après avoir reçu avis légal du jugement de cette cour, le tout avec dépens contre le conseil." Avis ayant été donné de la présentation de cette requête au secrétaire-trésorier du conseil pour le 3 juin, elle fut accordée comme suit : " This petition presented in chambers, on the 3rd june instant, and delay granted to answer until saturday, the 6th instant. Montreal, 3rd June, 1863, signed, J. SMITH, J." Le 3 juin, l'intimée répondit par écrit aux allégués de cette requête comme suit : " qu'il est vrai que les requérants ont fait application au bureau de révision pour faire entrer leurs noms sur la liste électorale comme électeurs ; mais que tous ou chacun d'eux ont été justement répudiés, parce que l'évaluation et la valeur réelle de leurs propriétés était bien au-dessous de deux cents dollars, ou d'une valeur annuelle d'au-dessous de vingt dollars ; que quelques-uns des requérants n'ont même aucune propriété quelconque et occupent seulement de très petits espaces de terrains sur la grève, lesquels terrains sont complétement improductifs, et que quelques autres requérants ont tenté de se qualifier exclusivement en vue de l'élection prochaine et par fraude et dol ; que, lors de la présentation de la requête devant le bureau de revision, environ vingt-cinq personnes ne se trouvant pas sur les listes

furent entrées sur la liste électorale, et ce sur la preuve qui fut faite de leur qualification, et sur l'application faite par un autre requérant que ceux mentionnés dans la présente requête ou dans la requête présentée au bureau de revision ; qu'il ressort de ce dernier fait que l'intimée a agi avec toute l'impartialité et toute l'équité nécessaires en pareil cas, en entrant sur la liste électorale, lors de la revision d'icelle, un plus grand nombre de personnes portées sur la requête des Appelants qu'elle n'en a inscrits de ceux portés sur un autre requête présentée par d'autres requérants ; qu'à aucune époque antérieure à la présente loi électorale ou à la présente revision du rôle d'évaluation, les propriétés occupées à quelque titre que ce soit par les Appelants n'ont jamais été évaluées à la somme requise par la loi pour donner le droit de vote, et que les propriétés sont toutes estimées à leur pleine valeur comptant et même avec terme ; qu'il est complètement faux que l'intimée ait refusé aux Appelants ou à leur agent le droit de faire entendre des témoins, lesquels ont été entendus par le bureau de revision, lorsqu'il a été requis de les entendre, et que, dans presque tous les cas, il n'a été offert aucun témoin au soutien de la demande des Appelants et qu'aucune demande n'a été faite pour faire assermenter et entendre aucuns témoins ; que bien plus le bureau de revision, voyant qu'il n'y avait aucun témoin pour soutenir la prétention des Appelants, en a lui-même fait entendre afin d'être encore mieux éclairé que par l'abstention significative des Appelants de faire aucune preuve ; que le rôle d'évaluation, corrigé par des estimateurs honnêtes et respectables et dont l'exactitude et l'impartialité ont été comme la loi le requiert, affirmées et attestées par le serment solennel des estimateurs, devrait suffire pour guider la conscience du tribunal, et que les Appelants admettant que le rôle d'évaluation a été suivi pour la confection de la liste, leur requête est en conséquence mal fondée et doit être rejetée. Pourquoi l'intimée conclut à ce que la requête des Appelants soit rejetée avec dépens contre les Appelants, et à ce qu'en conséquence le jugement du bureau de revision soit confirmé." Après la contestation liée et la production des articulations de faits de part et d'autre, la cour rendit, le 15 juin 1863, un jugement interlocutoire dans les termes suivants : "The court doth order that Respondents do transmit forthwith to this court the record of proceedings had before the municipal council of the parish of Laprairie, on the application of Joseph Deniger and others, the Appellants, to have their names inserted in the voters' list, and the decision of the council thereon, together with all papers and documents and orders connected therewith." L'enquête fut ensuite ordonnée pour le 18 juin, et plusieurs témoins furent entendus. Le 8

avril 1864, l'Intimée ayant discontinué sa contestation, le jugement fut rendu comme suit: " La cour, après avoir entendu les parties, l'Intimée ayant discontinué sa contestation avec dépens, accorde les conclusions de la requête des Appelants, et ordonne que les noms des Appelants, savoir... soient inscrits sur la liste électorale de la paroisse de Laprairie, et il est ordonné au secrétaire-trésorier de la municipalité d'inscrire lesdits noms sur la liste électorale, aussitôt que signification du présent jugement lui aura été faite, le tout avec dépens, contre l'Intimée, comme dans une action de première classe. (8 *J.*, p. 175.)

MAGLOIRE LANCTOT, avocat des Appelants.

MEDERIC LANCTOT, avocat de l'Intimée.

HYPOTHÈQUE LEGALE DE LA FEMME.

COUR SUPÉRIEURE, Montréal, 1er avril 1864.

Coram SMITH, J.

DEMERS *vs.* LAROCQUE.

Jugé : Que, par suite de la stipulation d'une hypothèque spéciale, jusqu'à concurrence d'une somme fixe et certaine, consentie par le mari à son épouse, pour ses droits mentionnés dans leur contrat de mariage qui a été enregistré, elle ne peut réclamer hypothécairement au-delà de telle somme ainsi stipulée. (1)

La Demanderesse, par sa déclaration, réclamait hypothécairement du Défendeur la somme de £769 7s 8d, comme suit, £469 7s 8d, montant de ses droits et reprises matrimoniales constatées par le rapport du praticien sur sa demande, et en conséquence de son jugement en séparation de biens d'avec son époux, J. A. Porlier ; £100 montant du mobilier réservé propre par son contrat de mariage ; £100 pour son douaire préfix, et enfin £100 pour son préciput. Elle alléguait que, par son contrat de mariage, reçu le 3 août 1845, Lacoste, N. P., portant communauté de biens, J. A. Porlier lui avait constitué un douaire de £100, qu'elle y avait stipulé un préciput de £100 ; que ses droits, dont son tuteur devait lui rendre compte, ainsi que tout ce qu'elle justifierait avoir apporté en mariage, lui sortiraient nature de propre, et, quant à tels droits, jusqu'à concurrence de £100 ; et pour sûreté de ces trois sommes s'élevant à £300, son époux (depuis décédé) lui avait donné, par tel contrat de mariage, une hypothèque spéciale sur l'immeuble dont le Défendeur est maintenant détenteur. Ce contrat de mariage avait été enregistré le 8 avril 1847. Le 30 septembre

(1) V. art. 2029 et 2044 C. C.

1846, la Demanderesse avait obtenu une séparation de biens et avait renoncé à la communauté, et le praticien avait constaté ses droits à £469 7s 8d, indépendamment de £300 mentionnés au contrat de mariage. Le Défendeur répondit à cette demande par une exception péremptoire, au moyen de laquelle il alléguait, que, par acte de vente reçu le 13 mai 1856, Jobson, N. P., J. A. Porlier vendit, franc et quitte, à l'auteur du Défendeur l'immeuble dont il est question, que cet acte fut enregistré le 15 mai, 1856, et, par acte de vente reçu le 18 mars 1862, le Défendeur fit l'acquisition de cet immeuble. "Et le Défendeur, aux risques et périls des représentants légaux de Joseph-Alfred Porlier, déclare que, quant aux montants reclamés par la Demanderesse, par sa présente action pour douaire, préciput et droits mobiliers, il s'en remet à la justice, acceptant telle condamnation que cette cour jugera de prononcer," et, quant au surplus, £469 7s 8d, le Défendeur soutient que la Demanderesse est mal fondée; que, dans tous les cas, en loi, la Demanderesse n'a pas d'hypothèque à réclamer en vertu du jugement homologuant le rapport du praticien et que, même en supposant que la Demanderesse aurait obtenu une hypothèque, en vertu du dit jugement, cette hypothèque serait rendue sans effet par l'enregistrement, le 15 mai 1856, de l'acte de vente par Porlier à Charles Larocque. Pourquoi le Défendeur s'en remettant à la justice, quant à la demande de la Demanderesse en raison des douaire, préciput et droits mobiliers par elle reclamés, et consentant à payer les frais d'une action non contestée pour tel montant qui sera accordé pour tels douaire, préciput et droits mobiliers, sauf son recours pour tels frais contre les représentants de Porlier, conclut à ce que la demande de la Demanderesse pour le surplus soit déboutée, avec dépens." (1)

BARNARD, pour le Défendeur: 1o. Il n'y a pas de preuve que les propres ont été vendus, ou que le mari en a reçu le prix. Le jugement homologuant le rapport du praticien, et le rapport du praticien lui-même ne peuvent faire preuve contre un tiers. *Bryson et al.* et *Dickson*, *suprà*, *p.* 319, et 3 R. J. R. Q., p. 426;

(1) Le 31 décembre 1863, cette cause avait été rayée du délibéré par le jugement suivant: BERTHELOT, J., "La cour, avant de prononcer au mérite, vu "qu'il a été produit de la part de la Demanderesse au soutien de sa demande, "le 10 juin, 1864, un original du rapport du praticien nommé dans une cause "ci-devant mue devant cette cour sous No. 1574, dans laquelle elle était De- "manderesse contre Joseph A. Porlier, dans laquelle dernière cause le dit "rapport fait partie du dossier ou record, a ordonné que cette cause soit "rayée du délibéré, que le dit rapport original soit remis par le protonotaire "dans le dossier ou record ci-dessus mentionné sous No. 1574, et qu'il soit "permis à la Demanderesse, si elle le juge à propos, de procéder à l'enquête "de nouveau, pour substituer à la preuve qu'elle prétendait avoir faite par "l'introduction du dit rapport en la présente cause, et de la preuve testimo- "niale par elle faite."

Macfarlane et *McKenzie*, 9 R. J. R. Q., p. 73, Remarques du Juge Aylwin. 2o. En supposant que la femme aurait eu une hypothèque légale pour remploi de propres, ce que le Défendeur nie, le Défendeur invoque l'opinion de ceux qui croient que l'hypothèque légale est soumise à la formalité de l'enregistrement. *Girard* et *Blais* (1) ; *Comte* et *le Procureur-général* (2). 3o. Même en supposant que l'hypothèque légale serait en général affranchie de l'enregistrement, le fait que dans le cas actuel la femme a pris hypothèque par son contrat de mariage pour £300 seulement, la rend non recevable à réclamer une plus forte somme contre les tiers. 2 Troplong, Priv. et Hyp., No. 550. Ce dernier moyen ayant été accueilli par la cour, elle accorda à la femme ses conclusions hypothécaires jusqu'à concurrence de £300, rejeta le surplus de sa demande et motiva son jugement comme suit : " The court, considering that Plaintiff hath established his right in law, to claim a *droit d'hypothèque* on the lot of land and premises, sold to Defendant and now in his possession to the extent of the sum of three hundred pounds and interest thereon as hereinafter mentioned, and for no other or greater sum ; And, considering that, in and by the contract of marriage of Porlier with Plaintiff, it is therein stipulated that the *droit d'hypothèque* stipulated in favour of Plaintiff for the surety and preservation of

(1) Dans *Girard* vs. *Blais*, et *divers Opposants*, Jean Baptiste Carrier et Marie Victoire Blais, son épouse, réclamaient, sur le produit des immeubles vendus en cette cause, comme appartenant au Défendeur, Jean Baptiste Blais, la part mobiliaire dans la communauté qui avait existé entre ses père et mère, Jean Baptiste Blais et Victoire Gautron, et ce, par droit d'hypothèque résultant de leur contrat de mariage, d'un acte de tutelle nommant Jean Baptiste Blais tuteur à ses enfants et d'un acte de partage, aucun de ces actes n'ayant été enregistré. Le projet de distribution colloquait J. B. Carrier et son épouse. Louis Blais, un créancier subséquent, réclamant en vertu d'un acte dûment enregistré, contesta cette collocation, prétendant que J. B. Carrier et son épouse avaient, par défaut d'enregistrement, perdu leur priorité sur lui. Ces derniers soutenaient que l'hypothèque, résultant d'un contrat de mariage, n'avait pas besoin d'être enregistrée pour conserver son rang. Le 14 octobre 1851, la Cour Supérieure (Bowen, J. en C., Duval, J., et Meredith, J.) maintint la contestation de Louis Blais, décidant qu'un enfant qui réclame sa part mobiliaire de communauté dans la succession de sa mère, a perdu son rang d'hypothèque sur les biens de son père, son tuteur, s'il n'a fait enregistrer le contrat de mariage, l'acte de tutelle ou le partage, sur lesquels sa réclamation est fondée. (2 D. T. B. C., p. 87.)

(2) Dans le cas d'une hypothèque générale, datée de 1815 et affectant un terrain situé dans le comté de Sherbrooke, et enregistrée conformément aux dispositions de l'ordonnance 4 Vict., ch. 30, le défaut d'enregistrement, dans le temps que le statut 10 et 11 George IV était en vigueur, ne peut être invoqué à moins qu'on n'établisse que le débiteur possédait ce terrain au temps où ce statut était ainsi en vigueur. Une hypothèque consentie par un débiteur peut valablement être enregistrée après son décès. Les hypothèques ne sont pas exemptes de l'enregistrement exigé par la sec. 4 du ch. 30 de l'ordonnance 4 Vict. (*Comte et al.* et *La Reine*, C. B. R., Montréal, 5 octobre 1857, Aylwin, J., Meredith, J., Short, J., et Badgley, J., confirmant le jugement de C. S., Québec, 17 février 1852, 6 R. J. R. Q., p. 386.)

all her matrimonial rights shall extend, first, to the sum of £100 for her dower, second, £100 for her preciput, and lastly, £100 for all other her matrimonial personal rights secured to her by the contract, and no more; And, further, considering, that, although Plaintiff may exercise her recourse against the estate of her late husband for all other her rights settled and established by the *rapport de praticien*, and the judgment thereupon, yet, as regards Defendant in possession of the land so mortgaged and hypothecated, Plaintiff had no other or further claim thereon than a claim to the extent of three hundred pounds, as stated aforesaid; And, further, considering that the parties to the contract of marriage having limited the *hypothèque* on the lot of land mentioned specially in the contract, to the sum of £100 for all personal rights in respects of the claim of the wife against her husband; Plaintiff cannot now claim by law any further or greater claim therefore; Doth declare the immoveable property, mentioned and described in the declaration in this cause, mortgaged and hypothecated for the payment of the sum of $300. (8 *J.*, p. 178.)

DOUTRE et DAOUST, avocats de la Demanderesse.

BARNARD, avocat du Défendeur.

ACTION HYPOTHECAIRE.

COUR SUPÉRIEURE, Montréal, 30 avril 1864.

Coram LORANGER, J.

WARD *vs.* ROBERTSON *et al.*

Jugé: Que les Syndics à la masse en déconfiture d'un insolvable ne sont pas des tiers-détenteurs possesseurs civils contre lesquels une action hypothécaire puisse être exercée. (1)

Le Demandeur réclamait $818.88 hypothécairement, des Défendeurs, comme étant détenteurs et en possession d'un immeuble, en leur qualité de syndics à la faillite d'un nommé Brown, et sur lequel immeuble ce dernier avait fait construire deux maisons, et pour le plâtrage desquelles maisons le Demandeur avait été employé par lui, et pour laquelle somme le Demandeur avait pris une inscription hypothécaire, au moyen des procès-verbaux requis par la loi en pareil cas. Le Demandeur alléguait son privilège spécial d'ouvrier sur cet immeuble qui avait été cédé par le failli aux Défendeurs, ses syndics, par acte notarié reçu le 30 juin, 1863, ainsi que toute la masse de ses biens, pour le compte et le pro-

(1) V. art. 772 C. P. C. et art. 2058 C. C.

fit de ses créanciers, conformément aux termes d'un contrat d'atermoiement. Diverses exceptions et défenses furent plaidées par les Défendeurs ; mais comme l'action a été renvoyée sur un moyen qui n'y est pas invoqué, il est inutile de les réciter. La Cour a motivé son jugement comme suit : " La Cour, considérant que les Défendeurs, en leur qualité de syndics à la masse en déconfiture de John Brown, en laquelle qualité ils sont poursuivis hypothécairement, comme détenteurs de l'immeuble décrit au libellé de la demande, ne sont pas, aux yeux de la loi, des tiers détenteurs, possesseurs civils, contre lesquels une demande ou action hypothécaire puisse être exercée, écartant les moyens de défense soulevés par les Défendeurs, sur lesquels il n'y a pas lieu de prononcer, a débouté et déboute le Demandeur de son action, sans frais, vu que les Défendeurs n'ont pas invoqué le moyen sur lequel le présent jugement est rendu." (8 *J.*, p. 180.)

McGEE et WALSH, avocats du Demandeur.

CROSS et LUNN, avocats des Défendeurs.

SLANDER.—PLEADINGS.

SUPERIOR COURT, Montreal, 18th June, 1864.

Coram MONK, A. J.

McLEAN *vs.* SHORT.

Held: That in an action of damages for verbal slander, it is not necessary to set out in the declaration the precise words complained of, and the allegation giving certain words complained of, "*or words to the same effect,*" is sufficient.

The Plaintiff sued Defendant for $800 damages alleged by her to have been suffered, because Defendant " without any just cause, but, maliciously, wrongfully, and illegally, did say and publish, in the presence of several persons, in speaking of and alluding to Plaintiff, and respecting Plaintiff and her character, the following words, or words to the same effect :" " Mary McLean is a common prostitute, a noted thief, and has been cured two or three times of the bad disorder by Dr. Worthington of Sherbrooke." The Defendant demurred to the declaration " because, by law, Plaintiff ought to have alleged absolutely and positively in her declaration the very words alleged to have been used by Defendant, and not that he used certain words, or others to the same effect, but which are not disclosed." The parties were heard on the demurrer and the Court dismissed it, with the remark, that it had been decided, in the Court of Appeals, in the case of *Beaudry* and *Papin*

(1) that the "*ipsissima verba*" of the slander need not be alleged. (8 *J.*, p. 181.)

DUNLOP and BROWNE, for Plaintiff.

ROSE and RITCHIE, for Defendant.

PRACTICE.—DEFAULT TO ANSWER PLEA.

COURT OF QUEEN'S BENCH, Montreal, 19th November, 1863.

Coram LAFONTAINE, C. J., DUVAL, J., MEREDITH, J., MONDELET, J.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF BEDFORD.

OMIE LAGRANGE, Plaintiff in Court below, Appellant, and HENRY CARLISLE, Defendant in the Court below, Respondent.

12 Vic., Cap. 38, § 85, has the following enactment: "And be it enacted that in any pleading in any contested civil case, every allegation of fact, the truth of which the opposite party shall not expressly deny, or declare to be unknown to him, shall be held to be admitted by him." And 23 Vic., c. 57, § 37, has the following: "Any party in the Superior Court, or in the Circuit Court in appealable cases, entitled to fyle an answer or reply, shall be bound to fyle the same within the delay prescribed by law, but shall be foreclosed from fyling the same by the mere lapse of the delay, without being entitled to a demand of such answer or reply; and in the case of no answer or reply being fyled within the delay prescribed by law, issue shall be deemed joined by the proceedings already fyled." (2)

Held: 1° That a Plaintiff who, in his declaration, expressly declares "that the sum of money, in the said promissory note specified, is now wholly due and unpaid," and who, in effect, repeats that declaration in his articulation of facts, cannot, under 12 Vict., c. 38, § 85, and 23 Vic., c. 57, § 37, in consequence of his failure to fyle an answer to De-

(1) Dans *Beaudry* vs. *Papin*, action pour injures verbales intentée par l'appelant contre l'intimée. Dénégation générale de la part de l'Intimé. La cause ayant été jugée par le jury, ce dernier rendit un verdict défavorable à l'Appelant qui fit ensuite motion pour un nouveau procès. Le 25 septembre 1856, la Cour Supérieure rejeta cette motion et, le 30 septembre 1856, sur motion de l'Intimée, débouta le Demandeur de son action. Beaudry interjeta appel, prétendant que la cause de la défaveur du verdict provenait du résumé fait par le juge et que le verdict était contraire à la preuve. L'Intimé soutint que le jury, étant le seul juge du fait, avait seul le droit de prononcer si la preuve était satisfaisante ou non; que la preuve était contradictoire et qu'en conséquence le verdict du jury devait être confirmé. Le 12 mars 1857, la Cour du Banc de la Reine (LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., dissident, et CARON, J.) cassa les jugements de la Cour Supérieure, décidant que les discours et propos attribués à l'intimé étaient injurieux et propres à nuire au caractère et à la réputation de l'Appelant; que, d'après la preuve faite devant le jury, l'Intimé avait tenu ces discours et propos injurieux au temps et en la manière allégués par l'action; qu'en conséquence le verdict du jury en cette cause était contraire à la preuve et qu'il y avait lieu à un nouveau procès. (1 *J.*, p. 114.)

(2) V. art. 138, 140, et 144 C. P. C.

fendant's plea, be held to have admitted that the note has been paid and discharged, as alleged by Defendant's plea.

2° That a Plaintiff who has failed to fyle an answer to an affirmative plea is not, under 23 Vic., c. 57, in consequence of that failure, to be considered in the same position as he would have been if he had been formally foreclosed, under 12 Vict., c. 38, from answering such plea.

The factum of Appellant contained the following statements: " Le jugement dont est appel a été rendu par le Juge McCord, à Sweetsburg, dans le District de Bedford, le 19 Septembre, 1826, et est conçu dans les termes suivants: " The court doth adjudge and condemn Defendant to pay and " satisfy to Plaintiff the sum of $204.84, composed as follows, " of the sum of $198.88, amount of Defendant's promissory " note, dated " Waterville, July 13th, 1861," payable to Chaun- " cey Warner, or bearer, on demand, with interest annually, " and of the sum of $5. 96 being the interest on the amount of " said promissory note calculated up to the thirteenth day " of January, 1862, together with interest on $198.88, from " the thirteenth day of January, 1862, until paid, and costs " of suit." L'Appelant avait rencontré cette action, 1° par une défense au fond en droit qui fut déboutée; 2° par une exception de paiement motivée comme suit: " And, without waiver " of the foregoing *défense en droit*, but, on the contrary, " reserving to himself all the benefit thereof, Defendant, for " further plea to Plaintiff's action, saith that, long prior to " the institution of Plaintiff's action, the note referred to in " Plaintiff's declaration was and is fully paid, satisfied and " extinguished, as Defendant will prove. Wherefore he prays " for dismissal of Plaintiff's action with costs." L'Intimé ne produisit aucune réponse, ni générale, ni spéciale. à l'encontre de cette exception de paiement, et, après avoir produit une articulation de faits inutile et sur lesquels aucune preuve ne devait être produite, mais qui, du reste, fut spécialement niée par l'Appelant, il inscrivit la cause pour la preuve sur la contestation soulevée, ou, pour se servir de ses propres termes, " on the issue therein raised," et pour l'audition finale au mérite à la fois, le seizième jour de septembre dernier. L'Appelant, s'en tenant au défaut de l'Intimé d'avoir répondu à son exception de paiement, et au bénéfice et privilége que la loi lui accorde en pareil cas, ne produisit aucun témoin ni aucune preuve, à l'enquête, du paiement de billet, tel qu'allégué dans son exception, preuve qu'il ne pouvait faire, d'ailleurs, qu'en obtenant une *commission rogatoire* pour examiner des personnes résidant dans les Etats-Unis et témoins de ce paiement; et, lors de l'argument, il soutint que l'Intimé, n'ayant aucunement répondu à sa dite exception, cette dernière et tous les faits qu'elle contenait, et, plus particulièrement l'allégation du paiement du billet étaient prouvés et admis par l'Intimé même.

Malgré ces prétentions de l'Appelant, la Cour Inférieure accorda jugement en faveur de l'Intimé, *mais à ses risques et périls*, ce qu'il accepta. Aujourd'hui, comme en Cour Inférieure, l'Appelant soutient que le paiement qu'il a plaidé à l'encontre de l'action de l'Intimé est prouvé, et que l'action devait et doit être déboutée, avec dépens. Si l'on consulte les lois de la procédure, qui nous régissent, l'on trouvera plusieurs dispositions, tant du droit commun que de nos statuts, concluantes en faveur de la cause de l'Appelant. Le principe qu'il invoque, on le trouve d'abord dans les lois de la procédure de l'Angleterre et des Etats-Unis, comme l'enseigne Philipps, dans son traité de la preuve *(édit. américaine annotée 1850)*, vol. 4, *notes to vol. 1*, pp. 604 et 608. On trouve également cette règle de procédure expressément formulée dans les lois de la procédure civile du Châtelet de Paris. Jousse, *Traité de la justice*, s'exprime en ces termes, sur ce point, à la p. 86e du tom. 1 : " Mais si l'action paraît suffisamment prouvée, le juge ex-" aminera les exceptions du Défendeur, pour voir si ces excep-" tions détruisent l'action du Demandeur ; car, si ces défenses " détruisent et anéantissent entièrement l'action, sans répliques " valables de la part du Demandeur, le juge doit pareillement " donner congé de la demande, de la même manière que " si la demande n'était pas prouvée." Pigeau, *Traité de la procédure civile du Châtelet de Paris*, tom. I p. 269 décide de même : " Si, dit-il, celui contre qui les faits sont articulés ne " les dénie pas, ils sont tenus pour avoués et l'on juge en con-" séquence." En cela, nos statuts provinciaux n'ont fait que confirmer les règles du droit commun suivi dans ce pays. On lit, en effet, à la 12e Vict., ch. 38, sec. 85, au ch. 73, sec. 76, p. 741 des stat. ref. du Bas-Canada, la disposition suivante : " Dans tout plaidoyer, dans une cause civile contestée, toute " allégation de faits dont la partie adverse ne niera pas expres-" sément la vérité, ou qu'elle ne déclarera pas lui être inconnue, " sera considérée comme admise par elle." La justice de cette disposition, tant du droit commun que de nos statuts, n'est pas douteuse, et est exposée en de bien belles paroles par le juge AYLWIN, pour et au nom de la majorité de la cour, dans une cause de Copps, Appelant, et Copps, Intimé, (1) où l'on lit, ce qui suit : " Now, a large portion of the services were " rendered in Upper Canada, and, to prove them, the party

(1) On doit, aux termes de la sec. 85 du ch. 38 du statut 12 Vict., nier expressément, dans une défense au fond en fait, chacun des faits allégués de la déclaration du Demandeur, autrement ces faits seront tenus pour avoués. (*Copps* et *Copps*, C. R. B., Montréal, 11 juillet 1851, ROLLAND, J., dissident, PANET, J. et AYLWIN, J., confirmant de C. S., Montréal, BOWEN. J. en C. et MEREDITH, J., qui avait confirmé le jugement de C. C., DUVAL, J., les deux juges composant la Cour Supérieure ayant exprimé des opinions différentes, 3 R. J. R. Q., p. 107).

" Respondent would have been obliged to sue out a *com-* " *mission rogatoire* to Upper Canada. Had he done so, the " Defendant might have said to him : " I never denied the " fact of the services having been rendered ; you have gone " into unnecessary evidence and must pay the costs yourself. " I deem the section of judicature act I have quoted above to " be one of the most wholesome and beneficial provisions of " the existing law." Aujourd'hui, comme dans le cas de l'Appellant Copps, si l'Appelant en cette cause eût pris une *commission rogatoire* pour les Etats-Unis, dans le but de prouver par témoins le paiement du billet en question, l'Intimé aurait pu lui répondre : " I never denied the fact of the payment " having been made ; you have gone into unnecessary evidence " and must pay the costs yourself." D'ailleurs, le principe que l'Appelant invoque a été reconnu dans deux autres causes jugées par la Cour Supérieure de Montréal, savoir ; *St. John* vs. *Delisle et al. (1)*, et *McGregor* vs. *McKenzie et al. (2)*. Il est vrai que, dans ces deux dernières causes, la décision ne va pas aussi loin que celle de la Cour d'Appel, dont nous avons parlé plus haut, un certain partage d'opinions existant sur l'effet du mot *expressément*, que contient la clause 76e du ch. 83 des stat. ref. du Bas-Canada ; mais, d'un autre côté, il ne semble pas douteux que ces deux dernières décisions établissent clairement que la partie qui ne nie pas, ni généralement, ni expressément et en aucune manière quelconque, les faits allégués par son adverse partie, est censée et considérée les avoir admis, et qu'alors il n'est pas nécessaire d'en faire aucune preuve à l'enquête.

The Respondent stated his case as follows : The Respondent brought his action on a promissory note in which it is *specially* alleged, " that the said sum of money, in the said promissory " note specified, is now wholly due, and *unpaid*, as appears

(1) Le certificat de l'huissier n'est pas une preuve authentique de la signification d'un transport fait devant notaires. Une réponse générale à un plaidoyer est suffisante pour obliger le Défendeur à faire la preuve des allégués de ce plaidoyer. (St. John *vs.* Delisle *et al.*, C. S., Montréal, 30 décembre 1851, DAY, J., SMITH, J. et MONDELET, J., 3 R. J. R. Q., p. 121.)

(2) Dans McGregor *vs.* Mackenzie et al., actions contre le souscripteur et l'endosseur de deux billets à ordre. Les Défendeurs plaidèrent que les billets avaient été obtenus frauduleusement et sans considération et qu'ils ont été transmis au Demandeur par collusion entre lui et le dernier porteur. A l'enquête le Demandeur prouva les principales allégations de sa déclaration. Les Défendeurs, au contraire, ne firent aucune preuve, mais à l'audition prétendirent que le, Demandeur n'ayant pas expressément nié la vérité des allégués de leur plaidoyer, ces allégués en vertu des dispositions de la sec. 85 de l'acte de judicature, devaient être tenus comme admis. Le 16 avril 1851, la cour (DAY, J., VANFELSON, J. et MONDELET, J.), jugeant que le Demandeur avait, en vertu de la section ci-dessus citée, nié suffisamment les allégués de la défense, rejeta les prétentions des Défendeurs et rendit jugement en faveur du Demandeur. (3 *R. J. R. Q.*, p. 123.)

" by the said promissory note herewith fyled to form part " hereof ; " that " the interest accrued thereon is still also due ; " and, that Defendant refuses to pay the amount of said note " and interest, although thereto often requested." To this, Appellant pleaded a *défense en droit* and a plea of payment before action commenced. Respondent answered the *défense en droit*, but fyled no answer to the plea of payment. The *défense en droit* was dismissed, and Appellant offering no proof of his plea of paymeut, the jugdment appealed from was,on the merits, rendered for the Respondent. That this appeal is a dishonest attempt to cheat the Respondent out of his money, he still holding the promissory note, and Appellant offering no proof whatever of its payment, is obvious ; and, to assist him in his purpose, Appellant invokes the fact, that Respondent having fyled no answer to his plea of payment expressly denying the same, that, therefore, he has admitted such payment. This is the only ground of appeal. Respondent submits that, by the allegations of his declaration above quoted, *directly denying* the payment of said note, and the plea of payment of Appellant, in answer to said allegation, issue is joined ; to wit, by the allegation of payment, by appellant, on the one hand, and the denial of payment, and the allegation of refusal to pay, on the other, by Respondent. We have here all the essentials of an issue, a fact, involving the whole issue, alleged by the one party and denied by the other. In addition to this, Respondent refers to the 75th sec. of " Consolidated Statutes," cap. 83, where it is expressly provided, that " if no answer be fyled within the delay, issue shall be deemed joined by the proceedings already fyled ; " that is, the parties shall go to proof of their respective allegations. With this law of procedure in support of Respondent's position as having expressly denied the material allegations of Appellant's plea and thereby, in fact, answered the same Respondent trusts that Appellant will fail in his obviously unfair purpose in this appeal. The section of law above cited was enacted in the 23 Victoria, and hence, in so far as it specially regulates pleading and procedure, must take precedence of any provisions upon the same points previously enacted. Had the contents of sec. 76 found a place in the " Consolidated Statutes " before Sec. 75, as they ought to have done, in the order of consolidation, thus showing that the legislation, on this point of the 12 Vic., had been much modified by that of the 23rd Vic., Appellant might have acquiesced in the judgment of the court below.

LAFONTAINE, C. J., *dissentiens* : Appel du jugement final du 19 sept. 1862, rendu a Nelsonville, dans le district de Bedford. Question de procédure résultant de certaines dispositions statutaires. (Chap. 83 des Statuts Refondus du Bas-Canada.)

L'action est fondée sur un billet promissoire du 13 juillet, 1862, fait payable à Chauncey Marner, ou au porteur. La *déclaration* du Demandeur allègue que le billet " is now wholly due and unpaid." Il y a une défense au fond en droit qui a été déboutée. Il ne faut pas s'en occuper. Mais elle est suivie d'un " Plea " ou exception péremptoire dans laquelle on allègue paiement du billet, même avant l'introduction de l'action. Le Demandeur a bien répondu par écrit à la défense en droit, mais n'a pas ainsi répondu à l'exception. Le Demandeur a, de plus, produit une articulation de faits, formant deux questions et le Defendeur y a répondu par une dénégation ; mais, de son côté, le Défendeur n'a pas produit d'articulation de faits. Aucun témoignage n'a été pris de part et d'autre. Enfin, le jugement du 19 septembre, 1863, condamne le Défendeur à payer le montant du billet. Le Demandeur n'ayant pas répondu à l'exception de paiement, le Défendeur prétend que, sous l'autorité du statut, le fait doit être censé admis. " Tous plai-" doyers sur le droit ou sur le fait....seront faits et complétés " par la *déclaration*, la *réponse* et la *réplique*, ou par le *plai-" doyer*, la *réponse* et la *réplique* dans les cas de plaidoyers " dilatoires (ou préliminaires), et au fond.... et pas d'autres " plaidoyers ou écrits sous forme de plaidoyers....ne seront " reçus ni admis." (Chap. 83 des Statuts Refondus du Bas-Canada, sec. 72.) C'était la disposition de l'ordonnance de la 25e Geo. III, chap. 2, sec. 13. La partie intéressée devait donc mettre l'autre en demeure de produire une *réplique*. On lit dans la section 76 : " Dans tout plaidoyer,....toute allégation de " faits dont la partie adverse ne niera pas expressément la vé-" rité, ou qu'elle ne déclarera pas lui être inconnue, *sera con-" sidérée comme admise par elle ;* et les frais découlant de la " preuve de toute telle allégation, ou de tout document produit " à l'appui, seront toujours à la discrétion de la cour, etc., etc." C'était la disposition de la 12e Vict., chap. 38, sec. 85. Son effet lorsqu'il avait lieu, équivalait donc à un aveu judiciaire, à une concession du fait, et l'autre partie était dispensée d'en faire autrement la preuve. Après, nous avons eu une loi spéciale en ce qui regarde une " action sur lettre de change ou billet " négociable, cédule, chèque, écrit ou promesse, ou autre acte " ou marché par écrit sous seing privé." C'est la 20e Vict., chap. 44, sec. 87. " Si," dans une telle action, " le Défendeur " fait défaut, ou si pour toute autre raison le Demandeur se " trouve avoir droit de procéder *ex parte*, alors telle lettre de " change ou billet.. seront présumés vrais *sans en faire la " preuve*, et jugement pourra être rendu en conséquence." (Stat. Ref., chap. 83, sec. 86, sous-sec. 1.) Puis, si dans toute telle action, un Défendeur nie sa signature ou toute autre signature ou écriture, etc....ou la vérité de tel document

ou de partie d'icelui...., que cette dénégation soit faite *en plaidant la dénégation générale* ou dans d'autres plaidoyers, tels document et signature seront néanmoins présumés vrais...., à moins qu'avec tel plaidoyer, il ne soit produit un affidavit du Défendeur, etc.... Chap. 83 susdit, sec. 86, sous-sec. 2.) Enfin, nous avons eu la 13e Vict, ch. 57, sec. 37, laquelle section est maintenant la 75e du dit chap. 83 des Stat. Ref. du B. C., qui porte que "toute partie.... "qui aura droit de produire une *réponse* ou une *réplique*, "sera tenue de la produire dans le délai prescrit par la loi, et "sera foreclose de ce faire par le seul laps du délai, *sans qu'il* "*soit nécessaire de faire une demande de telle réponse ou ré*-"*plique*, et, si telle réponse ou réplique n'est pas produite dans "le délai prescrit par la loi, *la contestation sera liée sur les* "*procédés alors faits.*" De ces derniers mots, on doit conclure, ce me semble, que le mot "réponse," employé dans cette section, doit s'entendre de la "réponse" à une exception, et non de la réponse à l'action, puisque, sans cette réponse, "la contestation sera liée sur les procédés alors faits," ce qui, nécessairement, suppose une réponse déjà faite à l'action par le Défendeur. Ainsi, à l'avenir, il n'est plus nécessaire de mettre la partie en demeure de produire une "réponse" à l'exception non plus qu'une "replique" à la défense. La "contestation" n'en sera pas moins "liée" par suite des "procédés déjà faits," c'est-à-dire, suivant le cas, par la *déclaration* du Demandeur et par *l'exception* ou la *défense* à l'action. "La contestation ainsi liée," est exclusive de toute réponse ou réplique que peut-être on serait tenté de supposer comme étant faite en pareil cas, soit *spéciale*, soit *générale*, n'importe de quelle façon par la partie qui n'en veut pas faire, et cela, nonobstant sa détermination de n'en pas faire, et la déclaration expresse du Statut, qu'en pareil cas la contestation sera "liée," et ce, sur les "procédés déjà faits," disposition qu'il serait plus que téméraire de regarder comme admettant ce qu'elle exclut expressément. La disposition dudit chap. 83, sec. 86, sous-sec. 2, permet donc de nouveau de plaider la dénégation générale, du moins à une action sur billet comme l'est la présente. Si tel est le cas, le Défendeur qui ne nie pas expressément une allégation de fait, ne sera donc plus, dans une cause de cette nature du moins, considéré comme l'ayant admise. Ce qui semble faire exception à la 76e sec. du dit chap. 83. Venons maintenant à l'articulation de fait, lorsque le consentement des parties n'en exempte pas selon la 93e sec. dudit chap. 83. "Dans les deux jours," dit la 77e sec. du chap. 87, "qui sui-"vront *toute contestation liée,* sur laquelle la preuve devra "être produite, chaque partie..... produira une articulation "de faits pertinents à telle contestation et non admis dans les

" plaidoyers, lesquels elle entend prouver, et en signifiera copie " à la partie adverse, et dans les trois jours qui suivront telle " signification, la partie à laquelle elle sera faite, produira et " signifiera sa réponse reconnaissant ou niant tous ou aucun " des dits faits, ou déniant que tous ou quelques-uns desdits " faits soient à sa connaissance ; et si telle réponse n'est pro- " duite et signifiée dans le délai susdit, les faits articulés par " la partie adverse seront considérés comme avérés par la par- " tie qui aurait dû produire et signifier telle réponse, aussi " bien que tout fait allégué dans l'articulation et non expres- " sément nié dans la réponse, ou que la partie faisant la ré- " ponse aura prétendu n'être pas à sa connaissance." C'est la disposition de la 20e Vict., chap. 44, sec. 74. Quant aux frais de la preuve des faits non mentionnés dans l'articulation, on peut voir la 3e sous-sec. de la sec. 87 du dit chap, 83, et aussi la 90e sect. qui a aussi trait au même sujet, dans le cas où " une " partie qui aurait dû produire et signifier telle articulation " de faits comme susdit, néglige de le faire, etc...." Il me semble que cette articulation de faits, exigée par la 20e Vict., chap. 44, rendait inutile la 85e sect. du chap. 38 de la 12e Vict., qui est la 76e dudit chap. 83 des Stat. Ref. du Bas-Canada, l'articulation, lorsqu'elle était faite, devant remplacer cette section pour les fins de la procédure. Mais le chapitre 83, dans sa sect. 92, semble ne pas vouloir qu'il en soit ainsi ; car cette section porte que " les six sections immédiatement " précédentes seront interprétées comme ayant été décrétées " pour donner suite aux dispositions contenues dans la 76e " section du présent acte, lesquelles dispositions seront tou- " jours appliquées dans la Cour Supérieure et la Cour de Cir- " cuit, dont les règles de pratique pourront comprendre toute " disposition qui pourra être considérée comme nécessaire pour " mettre à effet les dispositions de la dite section." Dans tous les cas, l'articulation de faits ne paraît pas être exigée des parties ; elle est seulement permise, et celui qui la fait s'assure certains avantages contre la partie qui n'y répond pas. Ici, il y a *contestation liée*, bien que le Demandeur n'ait pas répondu à l'exception du Défendeur. Il n'était pas obligé de le faire, et le Défendeur n'était pas obligé de le mettre en demeure. Mais puisque la 76e sect. doit être exécutée, ne peut-on pas dire que le Demandeur n'ayant pas répondu à l'exception de paiement doit être considéré comme ayant admis le fait ainsi allégué ? Il me semble qu'on doit en venir à cette conclusion, à moins qu'on ne prétende que " l'articulation de faits " du Demandeur ne doive répondre à ce qu'exigeait de lui la 76e section. Or, cette 76e section exigeait une " réponse " à l'exception dans laquelle fut faite la dénégation de l'allégation de paiement ; et le Demandeur n'a pas fait cette réponse. Il doit donc en subir les

conséquences. C'est la disposition expresse du Statut. Si le Demandeur n'eût pas produit d'articulation de fait, (et il n'était pas obligé de le faire) pourrait-on refuser au Défendeur l'avantage qui lui était acquis en vertu de la 76e section du chap. 83, par le fait même du Demandeur qui n'a pas jugé à propos de répondre à son exception ? Je ne le pense pas. L'articulation de fait ne propose que deux questions : 1° Le Défendeur n'a-t-il pas fait et signé le billet en question, et ne l'a-t-il pas délivré au Demandeur ? "Non," répond le Défendeur ; 2° n'est-il pas vrai que le Défendeur doit la somme dont le recouvrement fait l'objet de l'action ? "Non," répond le Défendeur. Si l'articulation de fait du Demandeur doit être censée suppléer à la "réponse" que ledit Demandeur avait le droit de faire, et qu'il aurait dû faire à l'exception, et si l'exception de paiement n'est pas une admission de la dette demandée, alors nous sommes sans preuve du billet en question. La force de ces aveux judiciaires est dans l'intérêt des deux parties ; elle dépend entièrement du fait auquel la loi les rattache. Si, poursuivi sur un billet, le Défendeur ne comparaît pas, ou bien comparaît, mais ne plaide pas à l'action, la loi veut qu'il soit censé avoir, par ce fait-là même, admis le billet, et le Demandeur a droit d'obtenir jugement. Car le Demandeur a, par sa déclaration, affirmé un fait qui, dans ce cas, n'est pas nié. Il a donc le profit du défaut de dénégation. Lorsque ce Défendeur plaide à l'action, et, dans son plaidoyer affirme un fait qui tend à repousser la demande, la loi (sec. 76 du chap. 83) veut que, si cet allégué affirmatif n'est pas nié par la "réponse" ou "réplique," il soit censé être admis ; elle lui donne la force de l'aveu judiciaire, en donnant en pareil cas au Défendeur qui a affirmé ou allégué le fait, le profit du défaut de dénégation. Si on objecte au Défendeur le défaut de production d'articulation de faits de sa part, il a droit de répondre : Je n'étais pas obligé d'en produire. Je puis être seulement exposé, le cas échéant, à payer certains frais de justice qu'une articulation de faits aurait peut-être pu m'exempter de payer. L'articulation de faits du Demandeur suppose qu'il voulait faire sa preuve des allégués de sa déclaration, il la proposait pour avoir une réponse affirmative. Au lieu de faire une réponse affirmative, le Défendeur en fait une qui est négative. Le Demandeur ne va pas plus loin ; il ne fait pas de preuve. J'ajouterai que la "contestation en cause" dont le Statut parle, n'est pas un droit nouveau ; c'est la répétition de l'article 104 de la coutume de Paris que je trouve copié dans le "*Nouveau Denisart*," contestation en cause est, quand il y a "règlement sur les demandes et défenses des " parties, ou bien quand le Défendeur est défaillant, et débou- " té de défenses. L'usage des déboutés de défenses dont parle

" cet article, a été abrogé par l'ordonnance de 1667, *tit.* 5, *art.* 2, " c'est pourquoi cette ordonnance, *tit.* 14, *art.* 13, dit que " la " cause sera tenue pour contestée, par le premier règlement " qui interviendra, *après les défenses fournies*, encore qu'il " n'ait pas été signifié. Ainsi, trois choses doivent essentielle- " ment concourir pour former la contestation en cause en " matière civile: 1° La demande de celui qui attaque (nous " avons ici la *déclaration* du Demandeur); 2° la réponse du " Défendeur ou son refus de répondre (ici nous avons l'excep- " tion péremptoire du Défendeur Appelant); 3° la prononcia- " tion d'un jugement quelconque (ici nous avons le Statut qui " tient lieu de règlement du juge, et qui prononce qu'il y a " contestation liée sur les " procédés déjà faits," c'est-à-dire, " par la demande et la réponse (déclaration et exception)." Pothier dit la même chose dans son Traité de la *procédure civile*, page 43, ". . . . Aussitôt qu'il y a eu des défenses four- " nies sur le fond de la contestation, ou même sans avoir été " fournies par écrit, si elles ont été prononcées devant le juge, " la première prononciation du juge qui intervient sur la plai- " doierie de ces défenses, forme ce qu'on appelle contestation " en cause." Je donne à des dispositions statutaires une inter- prétation dont pourrait profiter injustement le Défendeur, car on peut soupçonner un peu la sincérité de son exception. Il s'agit d'interpréter ou d'appliquer de nouvelles dispositions statutaires sur la procédure qui, peut-être, entraîneront plus de difficulté qu'on ne serait tenté de le croire à première vue. Je dois penser que je me trompe, puisque je diffère d'avec la majorité des juges de cette cour, mais si je suis dans l'erreur, quant à l'interprétation de ce qui doit former une " contesta- tion en cause " ou " contestation liée," il me semble que je le suis en assez bonne compagnie, l'étant avec Pothier et les au- teurs de la nouvelle collection de Denisart.

MONDELET, J.: The action was upon a promissory note. Plaintiff alleges that, at the time the action was brought, " the said sum of money, in the said promissory note specified, is now wholly due and unpaid, as appears by the said promis- sory note fyled to form part thereof: that the interest accrued is still also due." The Defendant pleads: " That long prior to the institution of Plaintiff's action in this cause, the note referred to in Plaintiff's declaration was and is fully paid, satisfied and extinguished, as the Defendant will prove." Now it is plain, that the 85th Section of 12th Vict., c. 38, that " any allegation of fact in a pleading not denied should be held to be admitted," would be conclusive, were it not to be taken and placed in juxta-position with the 37th Sec. of the 23rd Vict. c. 57 which enacts, that " if no answer or reply be fyled within the delay prescribed by law, issue shall be

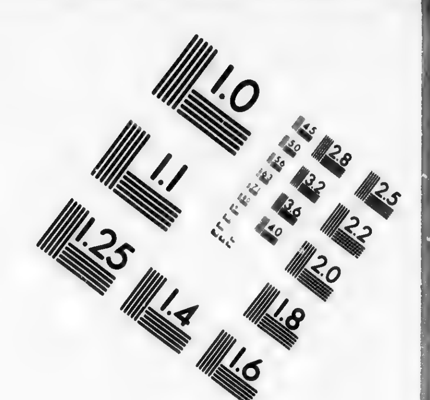
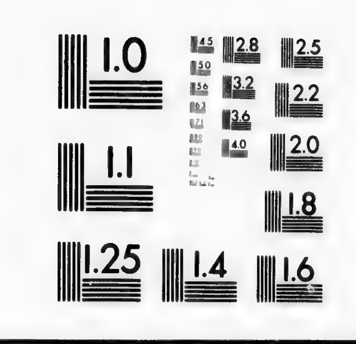


IMAGE EVALUATION TEST TARGET (MT-3)



6"



deemed to be joined, in the French text, "*la contestation sera liée*," by the proceedings already fyled." It follows, then, that the want of an answer to the Defendant's plea is tantamount to an answer. That answer might have been either special or general. If general, it would have been a denegation of the allegation of payment. If special, it would have been a repetition of the owing of the note by Defendant, at the time of the institution of the action. Consequently, not only is an admission of the note being paid out of the question, but we have technically, and according to law and the rules of procedure, well understood, a denegation of the plea of payment or a repetition of the allegation of the declaration of the note being due. I am, therefore, clearly of opinion, that were we to give the Statute of 1849 the interpretation which is sought to bring it under, without reference to the statute (23rd Vict.) which takes it out of the general rule which it would seem to have had in view to lay down, we would *forcibly* extract from Plaintiff's doings the very reverse of what he meant, and what was disclosed by his proceeding. Such a contracted interpretation of two Statutes, to give that of 1849 its effect in such a case as the present, would in my opinion not only be a flagrant injustice to Plaintiff, who would lose his debt, but it would be an interpretation which would be an error, a juridical error. The judgment of the Court below should be confirmed.

MEREDITH, J.: This Appeal presents a question of practice of general importance. The Plaintiff sued upon a promissory note which he produced with his declaration, alleging expressly that the amount of the note "was then *wholly due and unpaid*." The Defendant pleaded that the note had been paid. To this plea, Plaintiff fyled no answer. But by an articulation of facts he called upon Defendant to say in effect, 1° Whether he did not make the note? 2° Whether he did not owe the amount of it? To both these questions Defendant answered in the negative and the point which we have now to determine, is whether Plaintiff, who in his declaration expressly declared "that the sum of money, in the said promissory note specified, is now wholly due and unpaid;" and who, in effect, repeated that declaration in his articulation of facts, can nevertheless, in consequence of his failure *to fyle an answer* to Defendant's plea, be held to have admitted that the note had been paid and discharged, as alleged by Defendant. Under the 12th Vic., c. 38, Plaintiff would have had eight days to fyle an answer to Defendant's plea and he could not have been deprived of his right to fyle such answer without a regular notice, followed by a foreclosure. The interests of a party having a right

to fyle a pleading being thus carefully guarded by this statute, there was nothing unreasonable in the provision contained in it, declaring, in effect, " that any allegation of fact " in a pleading not denied, shall be held to be admitted." But the provisions of the 12th Vict., c. 38, already adverted to, were modified by the 23 Vict., c. 57. Under that law Plaintiff lost his right to fyle an answer by mere lapse of time, and without any demand of such answer being necessary. By the thirty-seventh section of the statute last mentioned, it is also declared, " that, in case of no answer or reply being fyled within the delay prescribed by law, *issue shall be deemed joined* by the proceedings already fyled." The pretension of Defendant, as I understand it, is, that Plaintiff, who has failed to fyle an answer to an affirmative plea, is, under the 23 Vict., c. 57, in consequence of that failure, to be considered in the same position as he would have been had he been formally foreclosed, under the 12th Vict., c. 38, from answering such plea. This pretension does not seem to me well founded; under the plain terms of the 12th Vict., c. 38, the failure to fyle an answer to an affirmative plea was, after a special foreclosure, equivalent to an admission of the allegations in such plea; whereas under the 23rd Vict., c. 57, the failure of Plaintiff to fyle an answer to Defendant's exception had the effect of causing " *issue to be deemed to be joined* by the proceedings already fyled." We must now, under the provisions of law just cited,consider the issue raised by the declaration and exception. But it does not therefore follow, that Plaintiff is to be deemed to have admitted the allegations in Defendant's plea ; on the contrary, I think, according to the 23rd Vic., c. 37, he is to be reputed to have done that which was necessary for the raising of the *issue*, which the law declares *shall be deemed to be joined ;* in other words, he is to be regarded as if he had fyled a general answer. I, therefore, think that the learned judge in the court below was justified under the 23rd Vict., c. 57, in holding that the failure on the part of Plaintiff to anwer Defendant's plea, ought not to be deemed an admission of the allegations contained in that plea. I shall merely add, that even if we had to decide this case by the provisions of the 12th Vict., c. 38, I think it might fairly be contended, that Plaintiff ought not to lose his action, in consequence of his having failed to repeat in a general answer an allegation which he had already made in his declaration. If Defendant had fyled a *défense en fait*, the case would, of course, be wholly different, because that plea, according to my view, would have thrown upon the Plaintiff the necessity of proving his note. Judgment confirmed. (8 *J.*, p. 182.)

D GIROUARD, for Appellant.

M. DOHERTY, for Respondent.

PREVIOUS CONVICTION.

COURT OF QUEEN'S BENCH, Crown Side,
Montreal, 17th March, 1857.

Coram AYLWIN, J.

REGINA *vs.* HARLEY.

On an indictment for any offence after a previous conviction, the Defendant is first to be arraigned and tried upon the offence charged, and if found guilty, then the jury are to be charged to try whether he has been so previously convicted. (1)

This was an indictment for house breaking and larceny therein, after a previous conviction for felony. The jury found the prisoner guilty of larceny, in manner and form laid in the indictment, but not guilty of house-breaking. Henry Driscoll, Queen's Counsel, fyled a certificate of a previous conviction for felony against the prisoner, which was read to the jury; and called * * * who were sworn and examined as witnesses to prove the identity of the prisoner.

His Honor, Mr. Justice AYLWIN, charged the jury, who said, by their foreman, that they found the prisoner to be the individual mentioned in the certificate of conviction. (8 *J.*, p. 280,)

NOTARY.—ARCHITECT.

COURT OF QUEEN'S BENCH, Montreal, 7th December, 1863.

IN APPEAL FROM THE SUPERIOR COURT, District of Montreal.

Coram Sir L. H. LAFONTAINE, Bart., C.-J., DUVAL, J., MEREDITH, J., MONDELET, A. J., BADGLEY, A. J.

Hon. GEORGE MOFFATT *et al.*, Defendants in the court below, Appellants, *and* THOMAS S. SCOTT, Plaintiff in the court below, Respondent.

Held: That plans, identified by parties to a contract to build a church and by the notaries, although not annexed to the contract nor specially stated to form part of it, form, nevertheless, an essential part of such contract, and, in the absence of proof that they are the property of the architect, will be deemed to be the property of the church and cannot be revendicated by the architect in the hands of the notary having the legal custody of the contract and being also the depository of the plans.

This was an appeal from a judgment rendered by the Superior Court, at Montreal, on the first day of December, 1862 (Mr. Justice SMITH presiding), maintaining an action instituted

(1) *Vide* the criminal law consolidation and amendment acts by Greaves, p. 202 and 203, as to the procedure now followed in England.

by Respondent against Appellants. The Appellants (with the exception of I. J. Gibb, notary public, one of them) were the building committee for the erection of Christ Church Cathedral, at Montreal. The Respondent was the architect employed in the erection of the cathedral, and who drew certain of the plans which are referred to in the contract for the building of the cathedral, executed between "The rector of the parsonage or rectory and parish church of Montreal" and Walter Wardle. The reference in the contract is as follows: (alluding to the manner in which the work was to be performed) "according "to the plans or drawings thereof, * * made by Thomas S. "Scott, architect, and in strict conformity with the specifi- "cations hereunto annexed; and forming part or parcel of "the present contract, which said plans and specifications are "identified by the signatures of the said parties hereto and us "said notaries." The plans in question, instead of remaining in the possession of the notary, got into the possession of Respondent, and, when it became necessary to have the cathedral examined by Appleton and Maxwell, to ascertain the cause of the sinking of the tower, (1) the committee (presuming that they were rightfully in Scott's possession) obtained the plans from Scott, on the understanding that they should be returned to him, after the examination of Appleton & Maxwell should be completed. Subsequently, Gibb, the notary, having discovered that the plans ought of right to be in his possession, addressed the following letter to the committee: "Montreal, 29th April, "1861. GENTLEMEN, Having been always under the impression "that the thirty-five plans referred to in the contract for "building the cathedral were to be deposited in the hands "of the architect, I have hitherto suffered them to remain "in his office, but I am now advised by counsel, and my "attention being specially drawn to the point, I perceive "that they form part of my notarial minutes, and ought never "to have left my possession. I am now informed that the "plans are in your possession. If so, I have to request you "will have the kindness to send them to my office in the "course of the day." On receipt of the foregoing letter the committee, at once, sent the plans to Gibb, and informed Scott, by letter, on the 7th of May, 1861, "that, when the "plans and drawings were received from him, it was the "belief of the committee that the plans and drawings "were Scott's property, and that a promise to return "them was given accordingly, but it being afterwards "fully ascertained that the notary, Gibb, had the sole "claim to the custody of the plans and drawings, they were

(1) V. *Wardle* et *Bethune*, 10 R. J. R. Q., p. 422.

now, by order of the committee, in his possession." The Respondent, on the pretence that the plans were really his property, brought an action *en revendication*, in the Superior Court, at Montreal, against Appellants, for the recovery of the plans; to which action Appellants pleaded, in effect, that the plans formed part and parcel of the notarial contract executed by the rector and Wardle, and were in the possession of Gibb, the notary, who was the legal custodian thereof. The Respondent never even attempted to prove any right of property of the plans in him, and Appellants established that the plans were the property of the cathedral. The following was the judgment pronounced by the Superior Court: "The court doth declare Plaintiff proprietor of the thirty-three plans and drawings of works in and about Christ Church Cathedral and doth condemn Defendants, jointly and severally, to deliver over the aforesaid plans and drawing to Plaintiff within twenty days after service of this judgment upon Defendants and, in default of so doing, to pay to Plaintiff the sum of sixty pounds, with interest thereon from this day, until actual payment and costs of suit."

MEREDITH, J.: If Plaintiff in the court below had proved a right of property in the plans in question and if, in addition to this, Defendants had failed to show that Plaintiff had consented to the plans being deposited in the office of Gibb, I should have felt no difficulty in maintaining Plaintiff's demand; for it is plain that, if the plans belong to Plaintiff, the parties to the contract in question could not, merely by depositing those plans in the hands of a notary public, deprive the owner of his right of property in them. In the present case, we know that the plans sued for are those according to which the cathedral was erected, and there is no proof that any special agreement was entered into respecting the ownership of the plans, or the place where they were to be kept. We see that they were placed in the hands of the notary, at the time of the execution of the contract, and were identified by the signatures of the parties and of the notaries. The Plaintiff does not even contend that they were so placed in the hands of the notary, and referred to in the contract, without his consent; and, under these circumstances, I think it is to be presumed that the plans were regularly deposited in the hands of Gibb, to remain in his office as part of the contract; and I am further of opinion that the agreement between the architect and the building committe, subsequently to the work being done, was not of itself sufficient to justify the court below in ordering the plans to be taken out of the possession of Gibb, who, according to the evidence before us appears tc be the proper custodian thereof. Three architects have been examined for

the purpose of proving that, according to general usage, the plans, prepared for a building by an architect, are the property of the architect, and not of the proprietor of the building. This however I think must depend almost altogether on the nature of the agreement between the architect and the proprietor in each particular case; and I do not think that the testimony of the three witnesses to whom I have alluded, however good their standing in their profession may be, is sufficient to establish a usage binding on a community generally. It is doubtless true, as these witnesses have said, that an architect has an interest in retaining in his possession the plans which he has prepared. But the proprietor of a building has also an interest in being able to have, at least free access to the plans according to which his building has been erected, and, in the event of changes, or repairs, being made, reference to the original plans might almost be indispensible. Our attention has been drawn to the circumstance that the plans in the present case are not annexed to what is commonly called the contract, as the specifications are. This perhaps may be attributable to the inconvenience that would have resulted from attaching such a number of plans to the remainder of the contract. But, be this as it may, it is plain, from the nature of the contract, that the plans form as much a part of it as the specifications. I may add that the architect being bound (*garant*) to the proprietors for the sufficiency of his plans, there is, at least in some respects, the same objections against allowing an architect to have the exclusive possession of the plans that there would be against allowing contractors to have exclusive possession of the specifications, or against the proprietor of the building having exclusive possession of the contract binding him to pay the price of the work. The ground, however, upon which I concur in the present judgment is that the evidence before us does not establish that Plaintiff is the owner of the plans; and I do not think that the arrangement between him and certain of Defendants justified the court below in ordering the plans to be removed from the office of Gibb, where, according to the evidence before us, they appear to have been regularly deposited.

The following was the judgment pronounced by the Court of Appeals: "The Court, seeing that the plans mentioned in Plaintiff's declaration were the plans and drawings mentioned and referred to in the contract made and executed on the fifteenth day of August, 1857, by and between "the rector of the parsonage and rectory and parish church of Montreal" and Walter Wardle, before Isaac Jones Gibb and his colleague, notaries public, as numbered respectively from number one to number thirty-five, which plans, it appears by the

said contract, a copy whereof is fyled in this cause, were at the time of the execution of the said contract identified by the signatures of the parties thereto and of the said notaries; seeing that Respondent hath not proved that he is the owner of the plans, and that the agreement between him and the finance building committee of Christ Church Cathedral, that the plans should be returned by them to him, does not of itself give him a right to cause the plans to be removed from the custody of Gibb in whose care and custody it is to be presumed, in the absence of evidence to the contrary; that the plans, which are an essential part of the contract, were legally deposited at the time of the execution of the contract, and, therefore, that, in the judgment of the Court below, condemning Appellants to deliver the plans to Respondent, there is error; doth, in consequence, reverse the judgment rendered by the Superior Court, at Montreal, on the first day of December, 1862, and, proceeding to render the judgment which the Court below ought to have rendered, doth dismiss the action and demand of Respondent against Appellants. (8 *J.*, p. 310.)

STRACHAN BETHUNE, for Appellants.
HENRY STUART, Counsel.
A. and W. ROBERTSON, for Respondent.

VENTE PAR COURTIER.

COUR SUPÉRIEURE, Montréal, 1er avril 1864.

Coram SMITH, J.

TOURVILLE *et al. vs.* ESSEX.

Jugé : Que dans les ventes faites par des courtiers (brokers,) il leur est nécessaire de donner un avis écrit (bought and sold notes) tant au vendeur qu'à l'acheteur de la transaction qu'ils ont effectuée pour en établir sa validité en loi. (1)

Le dix-neuf mai 1863, une action fut portée par Louis Tourville et Louis Gauthier, marchands à commission et associés de la cité de Montréal, contre Jeremiah Essex, commerçant de North Bennington, dans l'Etat de Vermont, Etats-Unis, pour

(1) Story on agency, p. 31, ch. 3, No. 28 in fine: "Hence, when he (the "broker) is employed to buy and sell goods, he is accustomed to give to the "buyer a note of the sale commonly called a sold note, and to the seller a "like note commonly called a bought note, in his own name, as agent of "each, and thereby they are respectively bound." Smith's, mercantile law, p. 497, 2e aliena: "A broker also is the agent of both parties within this "section. The mode in which he binds his principals *inter se*, is by the deli- "very of bought and sold notes, which notes constitute the bargain and are "the proper evidence thereof, provided always that they correspond."

le recouvrement d'une somme de $300, qu'ils réclamaient pour dommages et intérêts résultant pour eux d'un contrat que Jeremiah Essex, le Defendeur, se refusait à exécuter dans les circonstances suivantes, énumérées en la déclaration en cette cause : les Demandeurs, marchands à commission, ont, par l'entremise de Empey et Cie, courtiers, vendu au Défendeur trois mille cinq cents minots d'avoine, à raison de cinquante six centins par minot de quarante livres, laquelle avoine devait être livrée au Défendeur par les Demandeurs le ou vers le six mai 1863, à Saint-Hyacinthe. A l'époque fixée pour la livraison, et depuis, les Demandeurs ont sommé le Défendeur d'accepter livraison de l'avoine ; il a négligé de le faire. Les Demandeurs ont, en conséquence, et conformément à l'usage du commerce et à la loi, fait revendre l'avoine le dix-huit mai, 1863, par Sauvageau et Cie, courtiers de cette ville, pour le compte du Défendeur. Ladite quantité de trois mille cinq cents minots d'avoine a été vendue à raison de quarante huit centins par minot de quarante livres, et devait être livrée à bord des chars, à St-Hyacinthe, ce qui a produit un déficit de $280 sur le prix auquel le Défendeur l'aurait achetée ; laquelle somme, jointe à celle de vingt piastres que les Demandeurs réclament comme compensation de dépenses nécessaires pour faire vendre l'avoine, s'élève à celle de trois cents piastres. Les Demandeurs ont produit avec leur déclaration un avis de la vente à eux envoyé par Empey et Cie. Entr'autres moyens de défense, le Défendeur allégua qu'il n'avait rien acheté par l'entremise de Empey et Cie, et nommément qu'il n'avait jamais acheté la quantité d'avoine susdite. Il fut prouvé que l'usage invariable, parmi les courtiers, était d'envoyer également au vendeur et à l'acheteur un avis écrit (bought and sold notes) de la transaction que les premiers ont faite pour les derniers. La cour déboute l'action des Demandeurs, avec dépens, sur le principe que le Défendeur n'ayant pas reçu avis par écrit de l'achat que les courtiers sus-nommés avaient fait pour lui, n'était pas lié, et qu'il n'y avait réellement pas de vente, ce double avis étant nécessaire pour sa validité. (8 *J.*, p. 314.)

C. Archambault, avocat des Demandeurs.

Senecal, Ryan et DeBellefeuille, avocats du Défendeur.

AFFIDAVIT.—LIEN FOR SEAMAN'S WAGES.

CIRCUIT COURT, Montreal, 30th September, 1864.

Coram MONK, J.

DUBEAULT *vs.* ROBERTSON.

Held: 1st. Under the common law of France, which is in force in Lower Canada, a captain of a barge has a *lien* upon it for his wages as long as he remains on board.

2nd. Under the common law of France in force in Lower Canada the *lien* of a captain of a barge for wages includes the right of seizure before judgment, without the formality of an affidavit as required by Chap. 83 of the Consolidated Statutes of Lower Canada, such seizure being in the nature of a *saisie conservatoire*. (1)

A writ of *saisie-arrêt avant jugement* issued on a petition to a judge supported by the following affidavit "Louis Dubeault étant dûment assermenté sur les Saints Evangiles dépose et dit que Henry Robertson lui est endetté en la manière mentionnée en la précédente requête, et que le déposant a toute raison de croire et croit vraiment, en sa conscience, que la barge "Maud" est sur le point de laisser le canal Lachine, où elle est actuellement, pour se rendre en Haut-Canada, dans le but de frauder le déposant de son dû, et que, plus particulièrement, Henry Robertson a requis ce déposant de laisser le navire, mais a, en même temps, refusé de lui payer ladite somme pour gages, ou aucune partie d'icelle, et ce déposant le signe, lecture faite." (Signé) Louis Dubeault. Assermenté, à Montréal, ce dix-neuf août, 1864, pardevant moi. (Signé) J.A. LABADIE, C. C. S." On the 10th September, Defendant's counsel made a motion to quash the writ of *saisie-arrêt*, on the ground of insufficiency of the affidavit. At argument, Defendant's counsel submitted that the law relating to seizures before judgment was defined and expressly laid down in the 83rd chapter of the Consolidated Statutes of Lower Canada. There, it would be found that no seizure before judgment could issue in any case (except the two cases therein excepted), without an affidavit containing certain allegations therein specified. In the present case, the affidavit was defective and faulty, and contained almost none of the necessary allegations. The material allegation that Defendant was immediately about to secrete his debts and effects was entirely omitted. Neither was it stated that Plaintiff would lose his debt or sustain damage. The sole fact which was relied upon in the affidavit was that the barge was on the point of leaving the Lachine canal for Upper Canada, with the intent of defrauding Plain-

(1) V. art. 2383 C. C.

tiff of his due. Apart from the informality of this statement, its absurdity was manifest. It contained no complaint against Defendant; he did not intend, but the barge intended, a chattel intended. It was quite evident that the *saisie-arrêt* must be quashed. GIROUARD, for Plaintiff, *contra*: The affidavit is sufficient and more than sufficient, for the seizure is a proceeding under the common law of France in force in this country, and is in the nature of a *saisie conservatoire*. Under the common law, no affidavit is required for such a proceeding.

MONK, J.: The Plaintiff was the captain of a barge belonging to Defendant and his wages had accumulated. He seized the vessel, saying that he had a *lien* on it for his wages. This could not be disputed. It was stated that the affidavit was insufficient, but this was a *saisie conservatoire*. It was a process under the common law, and no affidavit was necessary. Motion rejected. (8 *J.*, p. 333.)

D. GIROUARD, for Plaintiff.

TORRANCE and MORRIS, for Defendant.

LIEN FOR SEAMAN'S WAGES.

CIRCUIT COURT, Montreal, 31st October, 1864.

Coram BERTHELOT, J.

DUBEAULT *vs.* ROBERTSON.

Held: 1st. The captain of a vessel has no *lien* upon the same for his wages.

2nd. A sailor, or seaman, has by the laws in force in Lower Canada a *lien* upon the vessel on which he serves, for his wages, under a recent statute.

3rd. A seaman cannot attach a vessel before judgment for his wages without making the affidavit required in all cases of *saisie-arrêt* before judgment, by cap. 83., secs. 46 or 175 of Consolidated Statutes of Lower Canada.

A writ of *saisie-arrêt* before judgment was issued, at the instance of the captain of a barge, for his wages, on a petition to a judge, supported by the affidavit recited in the foregoing report. In his declaration, Plaintiff also set up that he had a *lien* on the vessel for his wages. The Defendant fyled an *exception à la forme*, by which he prayed that the writ of *saisie-arrêt* be quashed, owing to manifest informalities in the affidavit. He also denied the captain's *lien*. The Plaintiff replied that the affidavit was sufficient and, in fact, superfluous, seeing that the captain had a *lien* on the vessel for his wages; such *lien* being declared by the common law of France.

The attachment was in the nature of a *saisie conservatoire*, and no affidavit was necessary.

GIROUARD, for Plaintiff, submitted the following questions and memoranda of authorities: 1° Le maître du navire a-t-il un *lien* ou privilège sur le navire pour ses gages; 2° A défaut de paiement, le navire est-il sujet à la saisie conservatoire? Sur la première question, il faut avouer que les lois de tous les pays ne sont pas uniformes. En Angleterre, on admet bien le privilège quant aux matelots, mais, quant au capitaine ou maître du navire, on le lui nie; car, dit-on, il a contracté avec le propriétaire, et il a suivi sa bonne foi et sa garantie personnelle. Aux Etats-Unis, la question n'est pas encore réglée. On accorde bien le privilège aux matelots, au capitaine pour ses avances et dépenses de voyage; mais, pour ses gages, la question est encore ouverte, et il y a des décisions dans les deux sens. On peut référer à *Kent's Commentaries*, vol. 3, pages 165, 167; Abbott, *on Shipping*, pages 183, 185, à la note, où la doctrine anglaise et américaine à la fois est développée. En France, sous l'ancien et le nouveau droit, le droit de gage pour les loyers des matelots et du maître n'a jamais été mis en question. Là, point de distinction entre le maître et les matelots; tous sont tenus de sauver le navire et la cargaison pour gagner leurs salaires; et tous ont un droit réel, un privilège premier sur le navire, ses agrès, la cargaison et sur tout ce qui en reste après le naufrage même. Valin, dans son *Commentaire* sur l'ordonnance de la Marine, pages 400 et 401, art. 8, livre 3, tit. 4, *Des Loyers des Matelots*, l'enseigne en termes exprès; et il est à remarquer que, sur cette question, Valin ne cite pas l'ordonnance, mais pose une règle de droit commun de la France, qui veut, règle générale, que les industriels et tous les mercenaires aient privilège sur la chose qu'ils travaillent, ou à l'occasion de laquelle ils donnent leurs services. "Les conditions du maître et des gens de l'équipage d'un vaisseau," dit Valin, "est telle que le sort des loyers dépend de la conservation du bâtiment et du fret des marchandises dont il est charge. "*Ce fret, avec le corps et la quille du navire, ses agrès, apparaux et ustensiles, voilà leur gage, et ils n'ont aucune autre assurance pour le paiement de leurs loyers.* "Rien n'est mieux établi, la justice n'y est du tout "point blessée; et quand il en serait autrement, la politique "et l'intérêt de la navigation exigeraient nécessairement que "cette loi fut maintenue dans toute sa vigueur." C'était aussi la disposition de l'ordonnance française de 1415, art. 8, 9 et 10 qui permet aux mariniers de saisir même la cargaison en cas de défaut de paiement. Cleirac, *Coutume de la Mer*, p. 351, 503. Cet article est ainsi conçu: "Le bateau est obligé à la marchandise et la marchandise au bateau, c'est-à-dire, si le

marchand ne paie pas le fret, s'il manque au terme et cause du retardement, le *patron ou les mariniers sont privilégiés de faire saisir les marchandises qu'ils ont conduites et vendre jusqu'à concurrence de leur dû.* 2° Maintenant le navire peut-il être saisi pour sûreté du paiement des loyers par saisie conservatoire ? Il est impossible de répondre à cette question dans la négative. De droit commun, en effet, celui qui a un droit doit avoir une action, et cette action, c'est la saisie-conservatoire, par laquelle la cour conserve au créancier privilégié le privilège qu'on menace de lui ravir. Cette saisie ne requiert pas l'affidavit requis par le statut ; car ce n'est pas le statut qui l'a créée, mais l'ancien droit français qui n'admet pas d'affidavit. Dans le cas de gage, par l'ancien droit français, il n'était pas même nécessaire d'avoir l'ordre du juge : "*Pour faire une saisie et arrêt valable,*" dit Ferrière, vol. 2, page 1259, no. 2, sur l'art. 178 de la Coutume, "*ceux qui ont privilège par la Coutume, la peuvent faire sans commandement, ni permission du juge.*" Le statut canadien n'a pas plus abrogé la saisie conservatoire du navigateur sur le navire, ou du voiturier sur la cargaison, qu'il n'a abrogé la saisie conservatoire du vendeur. Ni l'une ni l'autre n'ont été spécialement réservées, mais toutes les saisies conservatoires, et elles peuvent exister, comme le dit Ferrière, chaque fois qu'il y a privilège sur un meuble à conserver sont également conservées, suivant cette maxime applicable à l'interprétation des lois statutaires qu'un statut n'est pas censé abroger le droit commun à moins de termes formels ou d'incompatibilité. Mais ici, il n'y a pas abrogation ni incompatibilité ; et il faut, de plus, bien observer que l'affidavit requis par le statut est, pour la saisie-arrêt contre tous les biens et effets du débiteur accusé d'intentions frauduleuses, et non contre un meuble en particulier et pour cause de privilège. Le statut n'a rien statué sur ce dernier cas, et, en conséquence, nous restons régis par le droit commun : tout ce qu'il a fait, c'est qu'au lieu du simple commandement du juge que demandait le droit commun dans le cas de saisie-arrêt basée, non sur un privilège, mais sur le recel frauduleux, il a requis en outre le serment du Demandeur. Des saisies conservatoires comme celle du Demandeur ont été prises, il y a trois ou quatre ans, contre les navires May Flower, Banshee, St. Lawrence, Avon, Annuity, etc., C. C., Montréal. D'après les observations de la cour, lors de l'argument, le Demandeur a cru comprendre qu'elle ne lui niait pas son privilège, mais le droit de saisir autrement que par le statut. Or, le Demandeur soutient humblement que, chaque fois qu'il y a privilège et droit de rétention, il y a lieu à la saisie-conservatoire, si on cherche à enlever la possession des biens, sujets au privilège Cleirac, *Coutume de la Mer*, pages 351, 352, dit que le capitaine ou

voiturier peut exercer son privilège sur la cargaison, pour le fret, par la saisie-conservatoire, de même que les charpentiers-calfats et autres ouvriers qui ont travaillé au navire et ceux qui ont fourni des matériaux pour radouber le vaisseau. Le vendeur, aux termes des art. 176 et 177 de la coutume de Paris, a aussi le droit de saisie conservatoire, quoique non réservée par le statut. Le 10 septembre, 1860, la Cour de Circuit maintint une saisie conservatoire "for necessary supplies" à l'équipage, *Mullins* vs. *McRae et al.* Plusieurs saisies-conservatoires contre les navires May Flower, Annuity, Avon, St. Lawrence, ont été accordées par les juges, pour les gages des matelots. Quinze saisies furent aussi autorisées, le 16 juillet, 1860, contre Maxwell, pour l'équipage. Voir l'art. 100, tit. 8, de la Coutume de Paris. Enfin, cette question a été même décidée dans cette cause en faveur du Demandeur, par son Honneur M. le Juge MONK, sur une motion du Défendeur, et cette décision doit servir aux parties, non seulement comme *précédent*, mais encore comme *chose jugée*.

MORRIS, for Defendant, referred to the 83rd chapter of the Consolidated Statutes of Lower Canada, which disclosed the formalities necessary in seizures before judgment in all cases except two, specially excepted. These formalities had not been complied with in the present case and the seizure ought to be quashed. It had also already been decided that a captain has no *lien* for wages in the case of *Jasmin* vs. *Lafantasie*, (1)

BERTHELOT, J., in rendering judgment, said, in effect, that the principles involved were most important, and of great interest both to the members of the profession and to the community. The Plaintiff was the captain of a barge, which he had seized for his wages. The affidavit on which this seizure issued was totally insufficient, according to the terms of the 83rd chapter of the Consolidated Statutes of Lower Canada. But Plaintiff contended that, by the common law of France, he had a *lien* on the vessel, and that, under the same law, he could exercise that *lien* by attachment before judgment, without affidavit, such attachment being in the nature of a *saisie conservatoire*. The Defendant contended that the captain had no *lien*, or, if he had, in any case, it was a bare privilege, and should be preserved and exercised in a legal manner, viz., by attachment issued on the affidavit prescribed by the

(1) Dans la cause de *Jasmin* vs. *Lafantaisie*, J. avait fait saisir, par saisie-arrêt simple avant jugement avec affidavit à l'appui, le bateau de L, pour gages à lui dus par L. comme capitaine de ce bateau. La déclaration alléguait que le Demandeur, comme capitaine, avait un privilège spécial sur le bateau de L. pour le paiement de ses gages et concluait à ce que le bateau fut vendu. Le 31 mars 1862, la Cour Supérieure (SMITH, J.), annulant la saisie-arrêt, a jugé qu'il n'existait aucune loi accordant à un capitaine privilège spécial sur un vaisseau. (12 R. J. R. Q., p. 86.)

statute. The Court was aware that the points in contest had already come up before another judge, on a motion to quash, and that motion had been rejected. It differed, however, from the opinion of the honorable judge who gave that decision, and believed that no *lien* existed in favor of the captain. Nor was it alone in taking this view. A similar decision had been given in the case of *Jasmin* vs. *Lafantaisie*, supra, p. 378. The same opinion was held by several of the other judges, and, since a period of over thirty years, cases had been decided on the same principle. The laws in force in Lower Canada give to the sailor on board of a vessel a *lien* for his wages, and the statute above cited indicates the mode of procedure to make that right available before judgment. In regard to attachments before judgment, the statute already referred to is plain; no attachment before judgment can issue without the necessary affidavit, except in cases of *dernier équipeur* and *saisie gagerie*; this was the absolute rule; the exceptions marked the rule. A decision, in 1825, before the Court of King's Bench, had been shown to the Court, (1) by His Honor

(1) The following is the case referred to by the Court: COURT OF KING'S BENCH, October Term, 1825, REID *vs.* PORTEOUS: The Plaintiff in this cause, the master of a ship, had, to secure payment of freight, sued out a writ of *saisie-arret* or attachment, to attach, twelve days after their delivery, and, while they still remained in the hands of the consignee, certain goods which he had conveyed from Great Britain to Montreal. The Defendant moved, on the fifteenth day of October instant, for a rule to shew cause why the process of attachment issued in the same cause should not be quashed. And the *Solicitor-General* and *Buchanan*, in support of the rule, contended that the master had, by delivering the goods to the consignee, lost his lien for freight. That, by the laws of the province, the master had no right to follow the goods and attach them after he had parted with them, *Abbott, on Shipping*, p. 246. That, granting the right of lien of the master not to have been lost by the delivery, yet, he could not, by the laws of the province, enforce that right by process of attachment. The Provincial Ordinance of the 27th Geo. III, had prohibited the issuing of attachment against the debtor's effects, unless upon affidavit that the Defendant absconded, or was about to secrete his effects, or did suddenly intend to depart the province, and, one exception only, that of the case of the *dernier équipeur*, proved the generality of the enactment. The affidavit filed in this cause contained no proof of the facts required by the ordinance to warrant the attachment. *Beaubien* and *Badgley*, against the rule, relied upon an ordinance of the king of France of 1681, which gave to the master of the vessel the right of attaching for the surety of freight the goods conveyed, during fifteen days after delivery, if the goods remained in the possession of the consignee. They contended that this French Ordinance had, with other maritime laws, been introduced into Canada, by an *arrêt de règlement* of 1717, made for the French Colonies, establishing, in those possessions, Courts of Admiralty, to be governed in their decisions by the Ordinance of 1681, and other parts of the Maritime Law of France. That this was the law of the province, under which the Plaintiff had adopted the proceedings under discussion. The law of England could not be cited, it not being any part of the law of the country. Besides, in that country, there was a class of men called wharfingers to whom the master might deliver the goods to be kept till payment of the freight. Here, we had no wharfingers and such a law could not be applied to the state of commerce in that country. It was said, in reply, that the ordinance of 1681 had never been in force in this country,

Mr. Justice Badgley, the reasoning of which is applicable to the present case. The Defendant's *exception à la forme* must be maintained, and the attachment quashed. (8 *J.*, p. 334.)

D. GIROUARD, for Plaintiff.

TORRANCE and MORRIS, for Defendant.

it having never been enregistered in the Superior Council of Quebec and, at common law, in all cases, the duration of special liens depends wholly upon the continuation of possession. It required a positive enactment to introduce the *droit de suite* to secure the rights of landlords. But the *arrêt de règlement*, if it could be regarded as of sufficient authority to dispense with the formality of enregistering that ordinance, went to erect courts of admiralty in the colonies whose decisions should be conformable to the ordinance of 1681, and the French maritime law. Those courts of admiralty no longer existed, nor could the jurisprudence which they administered constitute the rules of guidance for any other judicature. It might also be said that this is a right founded on commercial usages, a portion of law liable to occasional fluctuation; usages of so much power that, even in France, they availed to subvert Royal ordinances. If so, they must here look to the usages which obtain in that country, with which we are constantly and solely in commercial relation, and there we find the rules to be directly against the privilege to which the Plaintiff has set up pretensions. No argument against that portion of the English law could be derived from the circumstance of there being no persons known by the name of wharfingers in this country. Other depositaries might be found in whose hands the masters of ships might place their goods to preserve their lien for freight. The Defendant, in this stage of the proceedings, to produce the quashing of the writ, relied mainly upon the Provincial Ordinance of the 27th Geo. III. On the 20th, the Court gave judgment, quashing the writ and releasing the goods from seizure. REID, Chief Justice, in delivering the opinion of the Court. said: That they thought the ordinance of 1681 in force in this country, and, although it had not been enregistered in the Superior Council, the king of France, as sole legislator, having the power so to do, had, by the *arrêt de règlement*, of 1717, introduced that body of law into this country. But, though the right of lien, to the extent sanctioned by that ordinance, did exist in the Plaintiff, yet, the law, as it now stands in this country, gave him no remedy to render that right available. Probably, the legislature which made the ordinance of the 27th Geo. III, had not reflected upon the valuable remedies of which the generality of their enactment deprived the subject, but they had, in general and positive terms, prohibited the issuing of attachments, for the recovery of moneys, without the proof of circumstances, which the affidavit in this case did not disclose. It is true the Courts, in this country, had, without such proof, since the passing of that ordinance, granted process of attachment, in cases of *revendication*, but they had done so, upon consideration, that the *saisie revendication* being used to obtain the restitution of property, not pecuniary, was clearly not within the purview of the ordinance.

REPORTER'S NOTE: Seamen have a *lien* on the vessel for their wages, Dowdeswell's Merchant Shipping Act of 1854 and 1855, p. 83, part 3; and *Vide* Interpretation of Clauses, in same book, p. 238, "Seamen shall include every person (except masters)," &c. *Mitchell* vs. *Cousineau et al.* Les gages des matelots sont privilégiés et payables de préférence aux hypothèques dues sur un bateau à vapeur naviguant dans les Eaux Canadiennes. (*Mitchell* vs. *Cousineau et al.*, *et Divers Opps.*, C. S., Montréal, 24 juin 1858, 12 R. J. R. Q., p. 168.)

CONTRAT A L'ETRANGER.—PAIEMENT.

COUR DE CIRCUIT, pour le comté de Huntingdon.

Coram LORANGER, J.

KCCOY *vs.* DINNEEN.

Jugé : " Qu'un billet promissoire, fait et daté à Malone, N. Y., entre citoyens Américains, mais payable au porteur généralement, et passé depuis entre les mains d'un Canadien, doit être payé en monnaie ayant cours en ce pays." (1)

Cette action était fondée sur un billet fait et daté à Malone, N. Y., le 27 février, 1863, pour la somme de $86.00, par J. Dinneen, le Défendeur, en faveur de Catherine Dinneen, ou au porteur. Le faiseur et le créancier étaient tous deux alors domiciliés à Malone, N. Y., McCoy, Demandeur, réside en Canada. Le Défendeur plaida, qu'avant l'institution de l'action, il avait fait des offres au Demandeur, qui était alors porteur du billet, en monnaie ayant cours dans l'Etat de New-York, où le billet avait été fait et souscrit, savoir, en *Greenbacks*, et qu'il était prêt et réitérait de fait ses offres. A l'audition, KERR, pour le Demandeur, soutenait que les offres telles que faites n'étaient pas légales, que le *papier-monnaie* connu sous le nom de *Greenbacks*, ne pouvait être offert légalement en paiement du billet, dans ce pays, parce que notre loi ne les reconnaissait pas. Qu'à tout événement, le Défendeur devait offrir au Demandeur, en paiement du billet, la monnaie ayant cours en ce pays, pour le montant du billet, moins l'escompte sur lesdits *Greenbacks*. Branchaud, pour le Défendeur, établissait en principe que, pour ce qui concerne l'essence et la nature d'un contrat d'un billet promissoire, ou lettre de change, la loi du lieu où ce contrat, billet, etc., était passé, devait être la seule qui devait guider la Cour dans sa décision ; que le paiement d'un billet doit être fait en monnaie ayant cours dans le lieu où il a été consenti, quoiqu'il fût payable généralement et qu'il fut transporté dans un pays où le cours est différent en vertu de cette loi, *lex loci contractus ;* qu'en conséquence, le billet consenti et daté à Malone, dans l'état de New-York, (la législature de l'Etat de New-York ayant décrété que des offres de paiement faites en papier-monnaie, connu sous le nom de *Greenbacks*, sont légales et valables dans ledit Etat pour toutes dettes civiles, et cette loi ayant été admise par le Demandeur) tombait sous la puissance de la loi du lieu du contrat, et que, partant, les offres du du Défendeur étaient bonnes et valables. Que la chose aurait été différente si le billet eût été fait payable à un lieu indiqué,

(1) V. art. 1163 C. C.

alors, la loi *loci solutionis* aurait prévalu et aurait déterminé le genre de monnaie que le Défendeur aurait dû offrir au Demandeur, mais comme il n'y avait aucun lieu d'indiqué dans le billet où il devait être payé, et que le billet était payable généralement, la loi *loci contractus* devait prévaloir. La cour motiva son jugement comme suit. Le billet est fait et daté à Malone, dans l'Etat de New-York, par le Défendeur, il est vrai, mais aussi il ne faut pas perdre de vue qu'il est payable au porteur. Le Défendeur, en consentant de payer un tel billet, s'obligerait de le payer en monnaie ayant cours dans le lieu où résiderait le porteur, et la loi du lieu du contrat ne peut s'appliquer en ce cas, d'autant plus que notre loi ne reconnait nullement le papier-monnaie en usage dans l'Etat de New-York. Le Demandeur doit donc avoir jugement pour le montant de son billet, suivant le cours de cette Province et les offres du Défendeur devront être déclarées insuffisantes. (8 *J.*, p. 339.)

KERR et NAGLE, pour le Demandeur.

ROBERTSON et BRANCHAUD, pour le Défendeur.

BILLET A L'ETRANGER.—PAIEMENT.

CIRCUIT COURT, Montreal, 30th November, 1864.

Coram MONK, J.

DALY *vs.* GRAHAM.

Held : The maker of a *bon*, made in the United States of America, payable on demand, if sued in Canada, will be condemned to pay the full amount of the *bon*, in Canadian currency, and a tender of the value of the *bon*, at the date of demand, in gold, less the discount on American bills, will be declared insufficient. (1)

The Plaintiff brought his action on the following note or *bon :* " Saint Paul, July 13th, 1859. Due Thos. Daly, on demand, forty dollars, value received. (Signed,) D. GRAHAM." The Defendant pleaded that the amount on the face of the note could not be demanded in canadian currency, and tendered payment, both in greenbacks and in their equivalent in gold, at the current rate of exchange when the demand for payment was made. In support of his tender and plea, Defendant contended that the contract or the *bon* was made in the United States, and the law of the place must govern the contract. The agreement was to pay in the currency of the coun-

(1) V. la cause de *McCoy* vs. *Dinneen*, ci-dessus p. 381.

try where the instrument was made, and, in order to succeed in his present demand, Plaintiff must show something by which the agreement had been altered or modified. The fact of Defendant removing from the country where the contract was made could have no effect upon it. The Plaintiff could not of himself alter the contract and oblige the Defendant to pay in the currency of any other country than that in which he stipulated to pay.

MONK, J.: An instrument like this *bon*, payable on demand, without any place of payment being specified, and floating about from one part of the continent to the other, must be paid in the currency of the place where the action is brought. The tender is, therefore, insufficient, and judgment will go for the amount on the face of the note in canadian currency) Judgment for Plaintiff. (8 *J.*, p. 340 et 15 *D. T. B. C.*, p. 137.

JOHN MONK, for Plaintiff.

TORRANCE and MORRIS, for Defendant.

PATROL EVIDENCE.

SUPERIOR COURT, Montreal, 30th April, 1864.

Coram BERTHELOT Justice.

GOLE *vs.* COCKBURN.

Held: That an agreement to release the maker of a negotiable promissory note, made after the signing and before the maturing of the note, may be proved by parol evidence. (1)

This was an action against Defendant as the maker of a promissory note for $400, dated the 18th day of January, 1861, payable three months after the date thereof, to the order of M. A. Clifford Dodds, who endorsed and delivered it to Plaintiff. The Defendant pleaded, " that, on the 18th day of March, 1861, at Montreal, Defendant made his certain promissory note in writing, bearing date at Montreal, the day and year aforesaid, and, thereby, three months after the date thereof, promised to pay to the order of M. A. Clifford Dodds, at the office of The Bank of British North America, three hundred and ninety-seven dollars and forty-five cents for value received; That the note was so made and signed as a renewal *pro tanto* of the note in the said declaration referred to and filed in this cause, and was delivered by Defendant to Clifford Dodds, on the express understanding that it was to be applied in that

(1) V. art. 1233, 1234 et 1235 C. C.

way; that, after receiving said note from Defendant, and before the same was discounted, Clifford Dodds obtained the assent of Plaintiff, who was then in her employ, to make use of note otherwise than by way of renewal of the note presently sued on, to wit, for her own use and profit, on the understanding and agreement, then and there entered into between them, that Defendant should be forever released and discharged on the note so now presently sued on, and that Plaintiff should only look to her, Clifford Dodds, for payment thereof; That the note for $397.45, which has since been paid by Defendant, and is now herewith filed, was so granted by him upon the faith of the same being applied as such part renewal; and that the application thereof in a different manner which had the effect of making Defendant apparently liable on two notes instead of one, was made by Clifford Dodds, with the privity and consent of Plaintiff and on the express understanding that Defendant was to be and he was, in effect, thereby, forever, released and discharged from all liability to pay the note presently sued on." At *enquête* the Defendant proved, by parol evidence, the essential allegations of his plea, with reference to the agreement to release under reserve of objection by Plaintiff that such an agreement could not be proved by verbal testimony. At the argument, KERR, for Plaintiff, relied on the inadmissibility of verbal evidence to defeit the written contract set up in the declaration, contending that a release such as pleaded could only be legally made under seal, and cited Story, on Prom. Notes, § 408. BETHUNE, for Defendant, argued that the agreement to release having been made after the written contract was executed, and not previously or contemporaneously, was susceptible of proof by oral testimony and cited *Goss* vs *Nugent*, 5 B. and Ad. p. 58.

"The court considering that Defendant has fully proved and established, by legal evidence, the material allegations of his plea, and that, before the note recited in Plaintiff's declaration had become due, Plaintiff had been willing to release and discharge Defendant of all responsibility as to the payment of the note of the 18th January, 1861, reserving only his recourse against the payee of the said note, that, therefore, Plaintiff's action is unfounded, doth dismiss said action." (8 *J.*, p. 341.)

KERR and NAGLE, for Plaintiff.

STRACHAN BETHUNE, for Defendant.

PROCES PAR JURY.—FRAIS.

COUR SUPERIEURE, Montréal, 30 avril 1854.

Coram MONK, A. J.

DESSAULLES *vs.* TACHÉ.

Jugé : 1° Que le montant du verdict d'un jury, même lorsqu'il est pour plus de 40 chelins sterling, règle la classe des frais d'action, si le jugement de la cour, ratifiant ce verdict, n'a pas statué sur les frais. (1)

2° Que, dans ce cas, quoique les frais ordinaires d'action soient reductibles au tarif de la Cour de Circuit, les déboursés nécessités par le procès par jury seront accordés au Demandeur.

Cette action avait été portée devant la Cour Supérieure, à St. Hyacinthe, en recouvrement de £500 de dommages pour libelle. Elle y avait été instruite devant un jury spécial qui avait accordé £25 de dommages. Le jugement de la cour, ratifiant le verdict, concluait comme suit : " En conséquence, " permet et adjuge au Demandeur de recouvrer la somme de " $100, étant le montant des dommages accordés par le dit " verdict au Demandeur, etc., et les dépens dont distraction, " etc." Le Protonotaire taxa les frais suivant la classe du montant demandé dans l'action, et non suivant celui du verdict. De là motion du Défendeur, en vertu du ch. 83 des stat. ref. du Bas-Canada, sec. 151, pour faire reviser cette taxe, et demandant " que les frais soient revisés et réduits et taxés au " montant de frais dus sur une action de la classe déterminée " par le montant pour lequel il y a jugement contre le Défen- " deur, savoir, réduits aux frais d'une cause de £25." Le seul juge résidant dans le district de St-Hyacinthe s'étant recusé, vu que, lorsqu'il pratiquait au barreau, il occupait pour l'une des parties en cette même cause, le dossier fut envoyé à Montréal, conformément aux dispositions du ch. 78 des stat. ref. du Bas-Canada, sec. 20, pour y être procédé sur cette demande de revision. OUIMET, pour la motion du Défendeur, s'appuyait sur le ch. 82, sec. 2 des stat. ref. du Bas-Canada, qui dit : " Mais si le montant obtenu est tel qu'il aurait pu être recouvré " dans une cour inférieure, il ne sera alloué au Demandeur " que les mêmes frais qui lui auraient été alloués si la poursuite " eût été intentée dans telle cour inférieure, à moins que la " cour dans laquelle le procès est intenté n'en ordonne autre- " ment." Si l'on prétend, ajoutait-il, que cette disposition ne s'applique pas au procès par jury, on trouve, au n° 18 du tarif de la Cour Supérieure, que les juges qui ont rédigé ce tarif, avec les pouvoirs nécessaires pour légiférer sur le sujet, ont interprété la loi comme s'appliquant à ces causes-là comme

(1) V. art. 479 C. P. C.

aux autres." In actions of damages for personal wrongs (ex-" cepting in actions in which the court or jury shall find the " damages to be under forty shillings sterling) the costs to be " taxed as of the class to be determined by the final judgment."

DOUTRE, J., C. R., contre la motion : Si cette question s'est déjà présentée dans ce pays, on n'en trouve pas de trace dans les rapports que nous possédons des décisions de nos cours. Des questions qui se rapprochent un peu de celle-ci ont été agitées dans les causes de *Ouimet* et *Papin* (1), *Kerr* et *Gugy* (2), *Leduc* et *Busseau* (3). La substance de ces décisions ne nous conduit qu'à ceci : C'est que les cours interprètent librement les jugements au regard des frais, quoiqu'il faille avouer que dans la cause de *Ouimet* et *Papin*, la Cour d'Appel ait cru devoir interpréter la question de frais autrement que la Cour Inférieure, et faire de cette différence d'interprétation l'occasion d'une infirmation de jugement. Si la cour ou le juge, qui instruit la revision des frais, cherche l'intention du juge qui a adjugé en première instance sur les frais, dans les termes du jugement, le caractère de la procédure doit, en cette cause, suffisamment indiquer l'intention du juge qui a accordé les frais. La loi ayant donné aux plaideurs le droit de soumettre leurs litiges à un jury, en certains cas, elle a dû vouloir les moyens de parvenir à cette fin, avec les seules restrictions qu'elle y a mises elle-même. L'acte d'interprétation (stat. ref. du Canada, ch. 5, sec. 6) dit : " *Vingtièmement*, et s'il est pres-" crit qu'une chose sera faite par ou devant un magistrat ou " juge de paix, ou tout autre fonctionnaire ou officier public, " alors la dite chose sera faite par ou devant celui dont la " juridiction ou les pouvoirs s'étendent au lieu où la dite chose " doit être faite ; et chaque fois qu'il est donné pouvoir à une " personne, officier ou fonctionnaire, de faire faire aucun acte

(1) Sur appel, un jugement, qui annule le verdict d'un jury et condamne l'Intimé à payer les frais en Cour Inférieure, comprend non seulement les frais sur la motion pour casser le verdict, mais aussi les frais du procès par jury. (*Ouimet et al.* et *Papin*, C. B. R., Montréal, 6 juin 1859, LAFONTAINE, juge en chef, AYLWIN, DUVAL et MEREDITH, juges, cassant le jugement C. S., Montréal, 29 juillet 1857, C. MONDELET, juge, 7 R. J. R. Q., p. 231.)

(2) Un jugement, condamnant une partie à payer une certaine somme avec dépens, doit être interprété comme condamnant aux dépens suivant cette somme et non suivant le montant de la demande, à moins qu'il n'apparaisse que l'intention de la cour était d'accorder des frais plus considérables. (*Kerr* vs. *Gugy*, C. S., Québec, 2 octobre 1860, TASCHEREAU, A. J., 8 R. J. R. Q., p. 474.)

(3) Sur le verdict d'un jury dans une action en dommages pour une somme au-dessous de 40 chelins sterling, la condamnation aux dépens, sans restriction ni limitation, ne comprend que les dépens de la somme accordée par le jury. (*Leduc* et *Busseau*, C. B. R., Montréal, 13 mars 1857, LAFONTAINE, juge en chef, AYLWIN, DUVAL et CARON, juges, confirmant le jugement de C. S., Montréal, 27 décembre 1855, 6 R. J. R. Q., p. 23.)

" ou chose, tous ces pouvoirs sont censés donné avec l'étendue " nécessaire pour mettre la dite personne, officier ou fonctionnaire en état de faire faire le dit acte ou chose." L'alinéa *Vingt huitièmement* de la même loi dit qu'il sera donné à toute disposition ou prescription de la loi une interprétation large et libérale et qui sera la plus propre à assurer la réalisation de l'objet de l'acte et de ses dispositions et prescriptions, selon leur vrai sens, intention et esprit. Partant de là, nous sommes légalement obligés de supposer qu'en nous donnant le procès par jury, en certaines matières civiles, le législateur savait qu'il nous donnait une institution anglaise, dont il connaissait le caractère, et qu'il nous la donnait avec l'étendue nécessaire pour mettre le plaideur en état de faire cette chose, d'en assurer la réalisation, selon son vrai sens, intention et esprit. La loi invoquée dit que si le montant obtenu est tel qu'il aurait pu être recouvré dans une cour inférieure, les frais devront être ceux de cette dernière cour, à moins que la cour n'en décide autrement. Eh bien ! Aurait-on pu recouvrer $100 devant un jury en Cour de Circuit ? Non. Nous avons reçu l'institution anglaise du jury, et c'est dans la jurisprudence anglaise qu'il faut chercher les principes qui doivent gouverner cette matière. Jusqu'au Statut de Gloucester (Edw. I, ch. 1) on n'accordait aucun frais d'action ainsi que l'atteste Hullock, *Law of costs*, tom. 1, p. 19, qui signale en même temps le changement opéré par ce statut : " The Statute of Gloucester gave costs in all cases, where (according to its most rigid construction) damages were recoverable either before or by that statute. The amount of the damages, to be recovered was totally immaterial, for a recovery of any sort of damages, however small, satisfies the words of the act ; but, as this general right to costs was found to be productive of several inconveniences, the legislature at length deemed it expedient, in certain instances, to abridge it." Ces inconvénients ont donné lieu au stat. 43 Elizabeth, ch. 6, (étendu aux actions pour libelles par la 21e Jacques I, ch. 16,) dont la sec. 2, dit : " if upon any action personal, &c., &c., the debt or damages to be recovered, &c., shall not amount to the sum of 40 shillings or above, &c., &c., the judge shall not award to the Plaintiff any greater or more costs than the sum of damages so recovered." Hors le cas où le jugement ou verdict est pour moins de 40 chelins, les cours anglaises donnent tous les frais encourus dans l'action.

MONK, J. A. : La cour est d'opinion que les prétentions respectives des parties sont justes dans certaines limites et exagérées sous certains rapports. D'un côté la loi et le tarif imposent à la cour la nécessité de prendre en considération le montant du verdict pour déterminer la classe des frais ; d'un autre côté, le procès par jury étant incompatible avec la classe

indiquée par le verdict, et le Demandeur ayant encouru des frais indispensables pour soumettre sa cause à l'arbitrage d'un jury, la cour ne peut être guidée uniquement par le montant du verdict. La cour croit donc légal et équitable de prendre un moyen terme, et d'ordonner que les frais ordinaires d'action seront taxés comme dans une action pour £25 ; mais que tous les frais nécessités par l'assignation du jury, sa rémunération, &c., devront entrer en taxe. Motion accordée. (8 *J.*, p. 342.)

DOUTRE et DAOUST, pour le Demandeur.

MOREAU, OUIMET et CHAPLEAU, pour le Défendeur.

PRESCRIPTION.—PROCEDURE.—PLAIDOYER.

COURT OF QUEEN'S BENCH, Montreal, 9th September, 1861.

In Appeal from the Circuit Court, district of Montreal.

Coram SIR LOUIS LAFONTAINE, C J., AYLWIN, J., DUVAL, J., MEREDITH, J., and C. MONDELET, J.

JESSE THAYER, Defendant in the Court below, Appellant, *and* JOHN W. WILSCAM, Plaintiff in the Court below, Respondent.

Held : 1. The declaration on oath of the Defendant in a cause, that he paid the debt demanded, by a "contra-account," which contra-account he stated that "he had not yet made up, but always supposed that the Plaintiff was in his debt," will not support a plea of prescription based on the allegation of payment.

2. Such a declaration affords a sufficient admission of the Plaintiff's demand.

3. But *semble*, a plea of prescription, alleging payment, accompanied by a *défense au fond en fait* is not an admission of the Plaintiff's demand. (1)

The judgment of the Court below was as follows: 31st December, 1860, Mr. Assistant Justice MONK : " The Court,

(1) Dans *McLean* vs. *McCormick*, action réclamant le montant d'un billet promissoire. Défense au fond en fait de la part du Défendeur et aussi exception péremptoire par laquelle il admettait l'existence du billet et en alléguait le paiement. L'allégué de paiement n'ayant pas été prouvé, le Demandeur, qui n'a fait aucune preuve, fit demande pour que jugement fût rendu en sa faveur sur l'admission de l'exception péremptoire. Le Défendeur demanda au contraire le renvoi de l'action parce qu'il importait au Demandeur de prouver l'existence du billet et que l'admission et l'allégation de paiement, contenues dans l'exception étant indivisibles, cette exception, si elle était admise, devait être regardée comme entièrement vraie, et la somme réclamée considérée comme payée. Le 28 Juillet 1851, la Cour de Circuit (à Québec, POWER, J.,) a jugé que la défense au fond en fait du Défendeur était incompatible avec son plaidoyer d'exception péremptoire admettant l'existence du billet et en alléguant le paiement ; que les allégués de cette exception étaient nécessairement divisibles, sans quoi aucune contestation n'aurait pu être liée sur

" considering that Defendant has not proved the allegation of " payment made in and by his plea, doth dismiss the said " plea, and, proceeding to adjudge upon Plaintiff's demand,

icelle. (3 R. J. R. Q., p. 42.) Dans *Casey* vs. *Villeneuve*, C. C., Québec, 29 November, 1851, POWER, J., 3 R. J. R. Q., p. 79, action réclamant le paiement d'effets vendus et livrés. Défense au fond en fait et exception de paiement de la part du Défendeur. Même décision que dans *McLean* vs. *McCormick*.

Dans la cause de *Copps*, Appelant, et *Copps*, Intimé, ce dernier, demandeur en cour de première instance, réclamait de l'Appelant la somme de £33 que, dans sa déclaration, il alléguait lui être due pour ses services, du 10 décembre 1849 au 29 juillet 1850, comme commis et contre-maître du Défendeur, à raison de £6 10s par mois, que le Défendeur avait promis de lui payer. Exception péremptoire de la part du Défendeur par laquelle il alléguait le paiement de la somme réclamée par le Demandeur, et aussi défense au fond en fait par laquelle il niait d'une manière générale tous les faits allégués par le Demandeur et, en particulier, l'allégué que le Demandeur lui eût rendu des services de la valeur de £6 10s par mois, ou de toute autre valeur, et que le Défendeur n'avait aucunement promis de payer de la manière alléguée dans la déclaration. La Cour de Circuit, (Duval, J.), jugeant que le plaidoyer de paiement du Défendeur comportait une admission de la demande, rendit jugement en faveur du Demandeur. Le Défendeur interjeta appel à la Cour Supérieure composée de BOWEN, J. en C., et de MEREDITH, J. Ces deux juges s'étant trouvés divisés d'opinion, le jugement de C. C., fut confirmé. Sur Appel, la Cour du Banc de la Reine (ROLLAND, J., dissident, PANET, J., et AYLWIN, J.), sans se prononcer sur la question de la divisibilité de l'aveu judiciaire contenu dans le plaidoyer de paiement, confirma, le 11 juillet 1851, le jugement de la Cour de Circuit, jugeant qu'en vertu de la sec. 85 du ch. 38 des Statuts du Canada de 1849, 12 Vict., qui décretait " que dans tout plaidoyer dans une cause civile contestée, tout allégué dont la partie adverse ne niera pas expressément la vérité ou qu'elle ne déclarera pas lui être inconnu, sera considéré comme admis par elle ; et les frais découlant de la preuve de tout tel allégué, ou de tout document produit à l'appui, seront toujours à la discrétion de la cour, de manière à ce que la totalité ou une partie quelconque de ces frais puisse être alloué contre la partie niant ou n'admettant pas quelque fait ou document qui, à l'avis de la cour, devait être connu d'elle pour vrai ou authentique, quelle que soit l'issue du procès," il est nécessaire, dans une défense au fond en fait, de nier expressément chacun des faits allégués dans la déclaration du Demandeur ; autrement ces faits seront tenus comme avoués. (3 R. J. R. Q., p. 107.)

Dans la cause de *Holland*, Appelant, Demandeur en Cour Supérieure, et *Wilson et al.*, Intimés, Défendeurs en Cour Supérieure, C. B. R., Québec, 1851, STEWART, J. en C., PANET, J., et AYLWIN, J., cassant le jugement de C. S., Québec, 6 Septembre 1850, VANFELSON, J., dissident, BACQUET, J., et DUVAL, J., 2 R. J. R. Q., p. 403, il a été jugé que l'aveu judiciaire est indivisible et que, dans l'espèce, l'aveu que l'on prétend se trouver dans les réponses spéciales du Demandeur, comporte une dénégation des moyens de défense des Défendeurs.

Dans la cause de *Clarke*, Défendeur en Cour de première instance, Appelant, et *Johnston*, Demandeur en Cour de première instance, Intimé, sur appel d'un jugement interlocutoire rendu par la Cour Supérieure, le 22 mars 1852, renvoyant la défense au fond en fait du Défendeur qui niait toutes les allégations de la déclaration du Demandeur, parce qu'elle était incompatible avec le plaidoyer de compensation qu'il avait antérieurement produit et qui admettait l'existence de la dette réclamée par la déclaration, il a été jugé par la Cour du Banc de la Reine, à Montréal, le 11 juillet 1853, ROLLAND, J., PANET, J., et AYLWIN, J., cassant le jugement de la Cour Supérieure, qu'un plaidoyer affirmatif, tel qu'une exception, peut être produit en même temps qu'une défense au fond en fait. (3 D T. B. C., p. 421.)

Voir art. 1203, 1243 et 2183 C. C., et art. 136 et 144 C. P. C.

" considering that Defendant, by his plea, hath admitted the " correctness of the account produced and filed by Plaintiff in " support of his demand, the court doth maintain Plaintiff's " action, and doth condemn Defendant to pay and satisfy to " Plaintiff, the sum of £36.6.9, for medicines found and pro- " vided by Plaintiff, for Defendant and his family, and for " the visits, care and attention of Plaintiff, as a physician and " surgeon, made, given and bestowed upon Defendant and his " family, from the thirteenth day of December, 1849, up to " the fourth day of June, 1856, inclusive, with interest upon " the said sum of £36 6 9, from the first day of October, 1860, " date of the service of process in this cause, until actual pay- " ment, and costs of suit, &c."

MEREDITH, J., *Dissentiens:* The Plaintiff, in the Court below, sued Defendant for £36 6s 9d, alleged to be due to Respondent for his services as a physician; part of that sum, namely, £36 4s 3d, being for services alleged to have been rendered from the year 1849 to the year 1855. The Defendant met this demand, in so far as regards the said sum of £36 4s 3d, by a plea of prescription of five years, in which Defendant alleged " that any and all sums of money which " were at any time due by Defendant to Plaintiff for any of " the causes mentioned in the said account, as previous to the " year 1856, were by Defendant fully paid and satisfied to " Plaintiff long previous to the year 1856." And the judgment of the court below was against Defendant, on the ground that Defendant " has not proved the allegations of payment made " in and by his plea, and that Defendant, in and by his plea, " has admitted the correctness of the account produced and " fyled by Plaintiff in support of his demand." This judgment is, in my opinion, opposed to the rule which has heretofore been observed in our courts, as to the effect of an admission contained in an affirmative plea, accompanied by one of a negative character. According to the constant practice of our Courts, a Defendant is allowed to file a denial, with an affirmative plea; and, although it has often been strenuously contended, and not without some appearance of reason, that there can be no injustice in limiting a Defendant, sued for a debt, to a single plea or answer, so as to compel him to say either that he never owed the debt, or that, at one time, he did owe it, but has since paid it: there are nevertheless many cases in which it would be most unjust to limit the Defendant to a single plea or answer. We will suppose, for instance, that a Defendant is sued for a debt alleged to have been contracted some ten or fifteen years ago. In the case supposed, a Defendant might be certain that he had paid the amount, but be uncertain as to his being able to prove the payment, in conse-

quence of his having handed the money to Plaintiff, or to his clerk, without a receipt; or Defendant possibly might have no recollection of having contracted the debt, and yet be satisfied, from his usual course of business, that if the debt ever was due he had paid it. If, in the case supposed, Defendant, being limited to a single plea, were to say, "I owe you nothing;" then, if Plaintiff were able to prove his stale demand, Defendant would not be allowed even to ask Plaintiff or his clerk whether the demand so made had not been paid. Nay, even if Defendant found a receipt in full, he would not be allowed to produce it. The conclusive answer to his request to do so, would be, you did not plead payment; but if he had pleaded payment merely, then, if neither party had a particle of proof beyond his own statement, and that of his antagonist, Defendant would be condemned, on the ground that he had not denied Plaintiff's debt. Now, let this system be contrasted with that to which it is opposed, and according to which Defendant in the case supposed would be allowed by one plea to say, I owe you nothing, and, by another, to say, the debt you claim has been paid; and it is obvious that these statements although they are different, and would admit different kinds of proofs, are not in any degree inconsistent with each other. Each speaks of the present position of Defendant to Plaintiff, and each says in effect, your claim is unfounded. The Defendant having thus pleaded, if Plaintiff proved his demand, and if Defendant failed in his defence, Plaintiff would have judgment; whereas, if neither party could prove any thing, the action would be dismissed. This, it appears to me would be just, because, by requiring each party to prove his own statement, Plaintiff and Defendant are placed upon a footing of exact equality; whereas, if Defendant is limited to a single plea, he is told in effect, you cannot be allowed even to attempt to prove what you say, until you first relieve your opponent, Plaintiff, from the necessity of making any proof whatever. In the present case, Defendant has filed two pleas; an exception of prescription and a denial of the debt; and the object of the foregoing remarks is simply to show that he had a right to do so, and that there is nothing unreasonable in giving him the benefit of the pleas as filed. The Defendant, in the present case, having filed a denial of the debt, the effect of that denial was, according to my view, to confine any constructive admission contained in the plea of prescription to the issue in which that admission is made. (1) The admission is

(1) See the remarks of Baron Alderson, in Stacy and Blake, 1 M. and W., p. 172, where the above rule, and the limitations to which it is subject, are clearly laid down. *Vide* also 1 Starkie, pp. 257-386; 2 Starkie, p. 17, Am. Ed. of 1834.

deemed to be argumentative, or hypothetical, and the exception itself, as the learned counsel for Appellant very well expresses it, "is looked upon as being called into action, only "when the existence of the debt has been proved by the party asserting it." Denisart says: (1) "celui qui excipe, ne confesse que conditionnellement, en cas que le Demandeur fasse "preuve de sa demande." And Guyot says, vol. 13, p. 562: "Le Défendeur n'est tenu à cette preuve que lorsque celui-là "a vérifié le fondement de sa demande," and in another place the same author says: "par la commune disposition du droit "le Défendeur, quand même il ne prouverait pas son exception, est toujours en voie d'être renvoyé absous, si le Demandeur ne prouve pas sa demande, *actore non probante reus* "*absolvitur.*" (2) The members of the bar are familiar with these authorities, and I would not refer to them, were it not that I am alone in the opinion which I have formed of this case; but the authorities bearing on Defendant's plea, in so far as it can be deemed to allege payment, are so pointed that I cannot refrain from strengthening the position I take by a succint reference to one or two of them. Nouveau Denizart, Verbo *Confession*, no. 9: "Supposons par exemple, que je "vous ai assigné en payment d'une somme, que je soutiens "vous avoir prêtée, et que sur cette demande vous êtes convenu du prêt, mais en ajoutant que vous avez rendu la "somme, je ne pourrai pas diviser la confession, c'est-à-dire "me servir de votre aveu, pour prouver la dette, et rejeter sur "vous la preuve du paiement;" and Toullier, 6 Vol., No. 339, says: "sans doute il est bien juste et naturel de ne pas séparer "l'aveu de la dette, de celui de paiement; *car, c'est le véritable* "*cas de l'indivisibilité de l'aveu;* car, si vous n'avez d'autre "preuve de votre créance que mon aveu, s'il n'en existait pas "d'autre, il est juste de m'en croire, lorsque j'affirme avoir "payé, car n'existant point de titre contre moi, je n'ai pas dû "songer à me faire donner une quittance parfaitement inutile." These authorities sufficiently show that the Defendant cannot be bound by the admissions contained in his plea; but it may be said that, although Defendant cannot be bound by the constructive admission contained in his plea, yet that he is bound by a like admission contained in his answer, upon the *serment décisoire*, in which Defendant, upon being asked, "Have you paid the amount to be recovered by this action, and, if so, in what manner," said: "By contra "account:" and upon being further asked the amount of that contra account replied: "that he has not yet made it up, but

(1) Denisart, *Verbo Confession*, No. 11.

(2) *Vide* the authorities on this point, in 2 R. J. R. Q., p. 406.

"always supposed that Plaintiff was in his debt." With respect to the foregoing answers, it is first to be observed that the questions put, were, according to my view of the case, irregular. Under the issues raised, Plaintiff was obliged to prove his demand; but, instead of doing so, he called upon Defendant to prove his defence; and, because Defendant's answers were not deemed conclusive as to the payment, Plaintiff has had a judgment in his favor, without any other evidence in support of his demand. The declaration, by a Defendant, that he has paid a debt, whether made in Court or out of Court, and whether made under oath or not under oath, ought not, I think, to be divided, so as to separate the constructive admission that the debt once existed, from the accompanying express declaration that it had ceased to exist. As further illustrating my view, I may revert to the hypothetical case already put. We will suppose that Defendant, when called upon to pay a debt, alleged to have been contracted ten or fifteen years ago, were to write to Plaintiff saying, "Sir, I am astonished at your demand; you know the amount you claim was paid to you long ago;" or we will suppose the answer to be, "We had as you know, mutual accounts at the time, by which yours was satisfied." It will hardly be contended that such a letter could relieve Plaintiff from the necessity of proving his case. Now, if a Defendant may write the truth in such a case with safety out of Court, why may he not speak the truth with equal safety in Court? Where there are good grounds for so doing, a Court or jury may believe one part of a statement, and reject the remainder; but, I cannot see any sufficient grounds for adopting that course in the present instance, and I feel the less disposed to do so in consequence of, as I conceive, the illegality of the questions put to Defendant. Taking the whole of Defendant's answers together, they amount to this. I did not employ Plaintiff professionally; but, if he ever had any claim against me, such as he contends, I had an account against him, which, although I never made it up, would, I am satisfied, more than suffice to counterbalance his. The statement of Defendant that he never made up his account is considered to make against him; but it is to be recollected, that Plaintiff's account commenced as far back as 1849, and that Plaintiff has not proved that he ever even rendered an account to Defendant, or ever received any payment, however small, which could be deemed an acknowledgment of his right. It seems to me, that my learned brethren view this case, as if when Defendant was examined, the *onus probandi* was upon him. Of course, had this been the case, the deposition, even of a credible witness, that Plaintiff's debt was paid, by an account not made up, would not have been satisfactory;

but, at the time of the examination of Defendant, the *onus probandi* was upon Plaintiff. And, if it be plain that the answers of Defendant are not sufficient to prove his plea, it seems to be equally plain, that they do not prove Plaintiff's declaration. I therefore cannot concur in the judgment about to be rendered confirming the judgment of the Superior Court.

Sir LOUIS LAFONTAINE, C. J.: L'Intimé, qui est médecin, demande le paiement de services professionnels. Le Défendeur oppose la prescription de cinq ans établie par le statut, excepté quant au dernier article du compte, lequel article est de 2s 6d, qu'il offre et dépose au greffe, avec les frais alors engagés sur l'action, comme dans une cause de la dernière classe à la Cour de Circuit. Et il ajoute, dans son exception de la prescription, qu'à l'exception de la somme de 2s 6d, pour service rendu en 1856, il a payé dès avant 1856, " toutes les sommes de deniers qui étaient en aucun temps dues par lui au Demandeur, pour aucunes des causes mentionnées dans son compte, antérieurement à l'année 1856." L'exception est suivie d'une défense au fond en fait. Le Défendeur a été interrogé sur faits et articles et sur serment décisoire. L'aveu qu'il a fait dans son exception de prescription, qu'il avait payé tout ce qui était dû pour les années antérieures à 1856, prouve qu'il avait, pendant ces années là, employé le Demandeur comme médecin, ce qui contredit l'une de ces réponses sur faits et articles. Sur serment décisoire, on lui fait deux questions : la première, " have you paid the amount sought to be recovered by this action, and, if so, in what manner? Il répond, " by contra account," la deuxième, " Being asked the amount of that contrat account? Il répond " that he has not yet made it up, but always supposed that Plaintiff was in his debt." Par la première de ces réponses, il admet le compte du Demandeur. Cela suffit pour établir la réclamation de ce dernier. Quant au compte qu'il prétend avoir contre le Demandeur, il ne le produit pas, il ne l'a pas même encore fait. Si un tel compte existe, que ne l'a-t-il pas plaidé en compensation? que ne l'a-t-il pas produit? Il aurait fourni à son adversaire l'occasion de débattre ce compte, et d'établir que le chiffre en était bien au-dessous de celui du compte qui fait l'objet de l'action. On ne peut pas ainsi déclarer, sur la simple supposition que le Défendeur exprime, que le Demandeur lui a dû, et que même il est encore endetté envers lui. A mon avis, le jugement de la cour de première instance est inattaquable. Le Défendeur a, par ses aveux, fait sa propre condition; il doit en subir les conséquences.

AYLWIN, J.: It is necessary to draw the attention of the parties to the *considérants* of the judgment in the court below, which are as follows " Considering that Defendant has not

proved the allegation of payment made in and by his plea, and considering that Defendant, by his plea, hath admitted the correctness of the account produced and filed by Plaintiff in support of his demand." The majority of the court do not concur in these *considérants*. They proceed upon a totally different basis and these *considérants* must not hereafter be cited as law. *The serment décisoire* contains *a transaction*. When it is resorted to, the issues in the cause vanish, and the justice of the demand is left entirely to the conscience of the party. This rule is handed down to us from the Roman law, and is well settled. *In fact*, the case is withdrawn from the judge, and is left to the party himself. Out of his own month he is to be acquitted or convicted. If the answer of Appellant had been clear, there would have therefore been no difficulty. But the answers are not positive and unqualified, and, moreover, the questions themselves are very peculiar. Usually, there is simply a precise question and a precise answer. It is much to be lamented that the usual practice was departed from, and the proceeding taken is of doubtful regularity, but not being asked to declare the proceeding null, I do not feel authorized for my part to pronounce it so. Therefore, the paper being of record, the court will take it as an answer binding upon Appellant. It will be perceived that Appellant, in his answer, states that he has never made up his account, but *supposes* it exceded that of Plaintiff. Since he has not produced the account or shown its amount, and does not swear positively to the amount of it, and in fact, admits that he has never made it up, he plainly has doubts himself as to its amount. He avoids any decisive statement about it, and the result necessarily follows. Since, therefore, he will not take upon himself to give a decisive answer when the cause is left to himself, no injustice can be imputed to a court which refuses to give effect to statements which are made without confidence. If he has a cause of action, he can bring his suit, and both parties will then obtain justice. The doctrine relied on by Appellant as to the affirmative plea is not only to be found in one book, but in every good book, and it cannot for a moment be disputed. It is not only Fachinæus who says so, but a hundred more authorities establish it. The reported case of *Clark* vs. *Johnson*, *suprà*, p. 389, contains many citations of authorities on the subject. And it is in accordance with reason and justice. Can it be possible that a Defendant having twenty valid defences, is to be confined to one? If so, he must take the responsibility of selecting one only of these defences, by which selection he will b bound; and he must be very careful, both as to his law and his facts, or he may not bring himself exactly within the views of the judge. Such a course would be unjust in the extreme, and it is not required

to be followed by the practice of the Courts of Lower Canada. But, on the grounds first stated, resting upon the answers of Appellant to the *serment décisoire*, the judgment of the court below should be confirmed.

DUVAL, J.: There is no difficulty about the pleadings. The difficulty is about the answers of Appellant. He demanded the right of settling the question at issue by his own oath, and it was referred to that. But he did not settle it. He set up a contra account and gave no particulars of that account. If he had a set off, it should have been pleaded in order that Plaintiff could answer it. But he says he has not made up the account. What remedy then had Plaintiff, if Defendant's pretensions were unfounded? He could not proceed against Defendant criminally for perjury, for there were no details or particulars of the account sworn to, to afford Plaintiff the opportunity of testing the truth of the answer by contrary evidence, and, therefore, there are no means of punishing Appellant, though his answer be false. The fact is, Appellant put himself in the position of a Plaintiff with regard to this account. And he desired to prove it by his own oath without producing it, or exhibiting the items of which it was composed. This he cleary, could not do, and his plea should be rejected.

MONDELET, C., J. This is an appeal from a judgment rendered by the Circuit Court at Montreal, against Appellant, at the suit of a physician, for medical attendance, for £36 6s 9d. There is a plea of prescription under the act of 1859 10 and 11 Vict., c. 26, § 14, "which provides that claims for medical attendance, &c., shall be prescribed by the lapse of five years from such attendance, service or medicine furnished." Defendant pleads he has paid and offers his oath. There is also a general denegation. If the plea be a mere plea of prescription, it is no admission of the debt. If it be a plea of payment, I hold it is. The Defendant has been examined on *faits et articles* and on *serment décisoire*, and there he swears he has paid, but, on being asked how he paid, he answers, "he has paid it by a contra account." Being asked the amount of this contra account, he again answers that he has not made it up, but always supposed that Plaintiff was in his debt. Now Defendant never pleaded a set off, he, therefore, cannot oppose any. If he has not pleaded payment, as he maintains, then he cannot upon the *serment décisoire* be allowed the benefit of an answer of payment as if he had pleaded it. But it is preposterous for Defendant to pretend that, by his answer, he has made out the payment. No such thing: he goes no further than to say he always supposed Plaintiff was in his debt. That will not do. He has fully admitted that he owed, but has failed to prove he has paid. I am clearly of

opinion that the judgment of the Court below ought to be affirmed.

The judgment in appeal was as follows : " The Court, seeing the answers upon the *serment décisoire* of Appellant, who was Defendant in the Court below ; considering that there is no error in the judgment appealed from, rendered by the Circuit Court for Lower Canada, sitting at Montreal, on the thirty-first day of December, 1860, in its *dispositif,* doth affirm the same with costs. Honorable Mr. Justice MEREDITH dissenting. (9 *J.*, p. 1.)

ABBOTT & DORMAN, for Appellant.

B. DEVLIN, for Respondent.

ASSURANCE.

COUR SUPÉRIEURE, Montréal, 30 novembre, 1864.

Présent : BERTHELOT, Juge.

BARSALOU, Demandeur, *vs.* THE ROYAL INSURANCE COMPANY, Défenderesse.

Jugé: Qu'en matière d'assurance contre le feu, et, dans l'espèce, il y avait réticence de la part de l'assuré, en n'indiquant pas qu'une allonge alléguée contenir des marchandises, était aussi occupée en partie comme cuisine, et que cette réticence, quoique non frauduleuse, rendait l'assurance sans effet. (1).

BERTHELOT, Juge, en rendant son jugement, exprima l'opinion suivante sur cette cause : La demande a pour objet de réclamer la somme de $9,065, montant de la police d'assurance effectuée par le Demandeur, au bureau de la compagnie, Défenderesse, le 26 novembre, 1859, par suite de l'incendie des choses assurées, dans la soirée du 11 novembre, 1860, au village de Ste. Scholastique. Les choses assurées sont ainsi désignées en la police et la déclaration, savoir : On a one story brick building, covered with wood, the property of the assured, occupied by him as dwelling, situate in village of Ste. Scholastique, $2,000 ; On household furniture, linen, wearing apparel therein, $800 ; On a similar building, adjoining the above, occupied as a store, $1,600 ; On shop fixtures therein, $165 ; On stock of goods in said store, consisting of a general assortment of *hardware, dry goods and groceries*, $4,000 ; *On wooden building in rear and adjoining the above store and house*, $200 ; On goods therein of *similar descriptions*, $300. Le Demandeur allègue, en sa déclaration, que toutes les propriétés mentionnées en la police ont été totalement consumées, et que l'incen-

(1) V. art. 2487 C. C.

die n'est pas arrivé par aucune des causes contre lesquelles la Défenderesse n'était pas tenue d'assurer, mais *par accident*, et qu'il a éprouvé des pertes au-delà du montant assuré ; qu'il s'est conformé aux conditions de la police, a notifié la Défenderesse de ses pertes, par états détaillés, affidavits, et, par sa propre affirmation, et ce dans le délai voulu et de la manière indiquée aux conditions stipulées en la police, puis il conclut au paiement du montant assuré, au refus de la Défenderesse de payer. L'on voit que le Demandeur reconnaît ou admet que les conditions au dos de la police étaient pour lui obligatoires, tout comme si elles eussent été insérées comme clauses même d'icelle, et, n'eut-il pas paru le reconnaître ou l'admettre implicitement, la cour n'aurait pas pu faire autrement que de déclarer qu'elles étaient strictement obligatoires pour lui, ainsi qu'il a été souvent décidé et jugé, par une suite de jugements qui font maintenant la jurisprudence de nos cours. La condition deuxième au dos de la police d'assurance est dans les termes suivants : " Every insurance attended with parti-" cular circumstances of risk, arising from situation or cons-" truction of the premises or nature of the trade carried on, " or *goods therein*, is to be specially mentioned in *the order* " for the policy, so that the risk may be fairly understood ; if " not so expressed, or if any misrepresentation be given, so " that the *insurance be effected* upon a *lower premium* than " could have been charged had such risk been so fairly stated." La Défenderesse, par ses défenses et plaidoyers, a articulé les moyens suivants : 1° Par son premier plaidoyer elle a prétendu que le Demandeur ne lui avait pas fourni et produit, ainsi qu'il était tenu de le faire par la police d'assurance et les conditions au dos d'icelle, des comptes et états détaillés avec la preuve d'iceux par affirmation, quoique requis de ce faire, et qu'il n'avait pas non plus produit aucune autre preuve raisonnable de sa perte ou dommage, ainsi qu'il était tenu de le faire. 2° Par son second plaidoyer, la Défenderesse expose que le Demandeur, ayant représenté que l'incendie était l'œuvre d'un incendiaire, elle avait envoyé sur les lieux Alfred Perry, pour s'enquérir des causes du feu, et que le Demandeur lui avait remis certains états produits comme ses exhibits depuis No. 1 à 6, et divers affidavits aussi produits comme ses exhibits, depuis No. 7 à 18, et le propre affidavit du Demandeur, mais que ces divers états et affidavits ne comportaient pas les détails et informations, et la preuve que la Défenderesse avait le droit d'avoir aux termes de la police et des conditions d'icelle, et qu'ils étaient insuffisants ; que, le 17 janvier, 1861, elle avait fait requérir le Demandeur, par le ministère de Beaufield et confrère, notaires, de lui donner des états détaillés de ses pertes, et affirmées par son serment, accompa-

gnées des explications requises par ladite notification, aux termes de ladite police, mais que le Demandeur n'y ayant aucun égard, avait fait rapporter la présente action ; 3° Par son troisième plaidoyer, la Défenderesse, après avoir articulé les mêmes allégués, quant à l'insuffisance des états, comptes et affidavits produits par le Demandeur, procède à attaquer lesdits états et comptes comme faux et exagérés, aussi bien que l'affidavit du Demandeur, et que la réclamation de ce dernier était fausse et frauduleuse. Enfin, la Défenderesse allègue que l'incendie n'était pas le résultat d'un accident, mais que la cause et l'origine du feu devaient être attribuées aux Demandeurs, qui s'en étaient volontairement et malicieusement rendus coupables, dans la vue de frauder la Défenderesse. 4° Suit une défense au fond en fait. Le Demandeur a fait des réponses et répliques d'un caractère général, à l'exception de cette partie d'icelles, par laquelle il repousse les imputations d'avoir été la cause du feu, en disant que le Grand Jury du District de Montréal, devant lequel l'accusation avait été portée, avait rapporté qu'il n'y avait pas matière à accusation contre lui, *no bill*. Par un plaidoyer supplémentaire additionnel que la Défenderesse a eu la permission de produire, en date du 17 septembre, 1861, elle invoque plus spécialement les deux premières conditions au dos de la police exprimées dans les termes suivants : " 1. Every " person desirous of effecting an insurance must state his name, " place of abode and occupation ; he must describe the construc- " tion of the buildings to be insured, where situate, and in " whose occupation ; of what materials the same are respec- " tively composed, and whether occupied as *dwelling houses* or " *otherwise*, also, the nature of the goods or other property on " which such insurance may be proposed, and the construction " of the buildings containing such property, and whether there " be any *apparatus* in or by which heat is produced other " than grates in common fire place, in any of the said build- " ings or connected therewith ; 2. every insurance attended " with particular circumstances of risk, arising from the " situation, contiguity to other buildings or construction of " the premises, or the nature of the trade carried on, or goods " therein, is to be specially mentioned in the order for the " policy, so that the *risk may be fairly understood ;* if not " so expressed, or if any misrepresentation be given, so that " the insurance be *effected upon lower* premium than would " have been charged, had such risk been so fairly stated ; or " if buildings or goods be described in the policy otherwise " than they really are, or if, after an insurance shall have " been effected, there shall be any erection or *alteration* or " *extension* of the premises so as to increase the risk, or any " apparata for producing heat as aforesaid ; or if any hazar-

" dous operation or trade shall be carried on, or any hazardous " goods be deposited or any hazardous communication be made, " and the same be not respectively made known to the office, " in writing; or if the insurer shall neglect or refuse to pay " any further premium which may be demanded, in conse- " quence of increase of risk, from any of the aforementioned " circumstances, the *insured will not* be entitled to any bene- " fit under *the policy;* but the party so insuring may have a " new policy upon *such terms* as may be agreed upon." Et elle prétend que, lorsque la police d'assurance fut effectuée, le Demandeur lui avait représenté que la bâtisse en bois, adjoignant par derrière le magasin en brique, était occupée seulement comme magasin, et qu'en conséquence le premium n'a été par elle chargé qu'à raison de quinze chelins pour cent louis, tandis que, de fait, au temps que l'assurance a été effectuée, ainsi qu'au jour de l'incendie, elle était divisée en trois compartiments, dont un seul servait de magasin, un autre comme cuisine en hiver, et le troisième comme cuisine en été; que, si elle eût alors connu cela, elle aurait refusé d'effectuer la police d'assurance, ou qu'à tout événement elle ne l'aurait fait qu'à un taux beaucoup plus élevé, et justifié par de plus grands risques, résultant de l'état vrai et réel des lieux à cette époque; et, qu'en conséquence, la police d'assurance était nulle par suite des fausses représentations du Demandeur sur l'état des lieux, et qu'il ne pouvait réclamer aucun bénéfice en vertu d'icelle. Le Demandeur a répondu à ce plaidoyer que la visite des lieux avait été faite avant l'assurance effectuée par les agents de la Défenderesse; que, d'ailleurs, il avait déclaré que, dans cette bâtisse en bois, il se trouvait des effets de même espèce que ceux qui étaient dans la maison et le magasin; qu'enfin, cette cuisine n'avait pas augmenté les risques et que le feu n'avait pas originé dans la cuisine. La question soulevée par ce dernier plaidoyer, quoique venant en dernier ordre, est bien la plus importante de la cause, et doit être naturellement examinée la première, en fait et en droit. Et d'abord en fait: Il est prouvé par Brault que la description des lieux lui a été donnée le 24 novembre 1859, par Barsalou lui-même, qui a signé au bas d'icelle, en lui expliquant que la bâtisse en question était uniquement occupée comme décharge pour le magasin où il mettait des marchandises, et que, vu que c'était une bâtisse de peu de conséquence suivant la description ainsi donnée, il n'avait pas augmenté le taux de l'assurance. Il ajoute que le Demandeur ne lui avait jamais expliqué qu'elle était divisée en trois parties: magasin, cuisine et remise, cette dernière occupée comme cuisine en été, car il aurait mis cette description dans l'application et la police, et aurait chargé 5 ou 6 piastres (ce que nous chargeons sur les

bâtisses en bois), ce sont ses expressions, et il affirme que le Demandeur lui a fait comprendre que cette bâtisse en bois n'était qu'une décharge à son magasin. Je n'ai pas besoin de dire que pleine foi doit être accordée au témoignage de Brault dont le caractère est celui d'un homme d'une grande respectabilité et au-dessus de toute attaque. Routh, agent principal de la Défenderesse, dépose qu'avant l'émanation de la police, le Demandeur est allé à son bureau avec Brault, et que la bâtisse en bois lui fut désignée par le Demandeur comme un magasin, et que ce dernier ne l'a pas informé qu'aucune partie d'icelle fût employée comme cuisine ; que, s'il avait su qu'aucune partie de cette bâtisse servait de cuisine en hiver, et que la partie d'icelle servant de remise était convertie en cuisine durant l'été, il croit qu'il aurait entièrement refusé de se charger d'un pareil risque, qu'il qualifie *d'extra hazardous*, ou que, s'il l'eût accepté, il aurait chargé à raison de 32s 6d ou 35s par £100. Il ajoute qu'il n'a jamais su que cette bâtisse servait ainsi de cuisine avant qu'il en eût été informé, tel que mentionné en son affidavit du 12 septembre, 1861. Le Demandeur n'a pu nier que l'occupation et l'usage de la bâtisse en question fussent, ainsi qu'il vient d'être rapporté, mais il a prétendu qu'il n'en avait jamais donné de description verbale ou écrite, prétendant que Perry, l'inspecteur de la compagnie, avait visité les lieux, et que c'était sur son rapport que l'assurance avait été effectuée. Brault nie positivement avoir eu des conversations avec ou des informations de Perry touchant cette assurance ou la description des lieux avant la date de la police, affirmant qu'elle avait été effectuée *seulement* sur la description du Demandeur lui-même, " et *non pas* sur aucune inspection faite par notre inspecteur." Ce que le Demandeur a pu prouver de plus plausible pour repousser la responsabilité qui lui incombe, en tant que la description des lieux a été donnée par lui, résulte de la production d'une lettre de Champion, prétendue écrite au nom de Routh, en date du 3 novembre, 1859, au Demandeur lui-même, dans ces termes : " I shall be happy to insure the property of which " you left me a memorandum when last in town, at the rate " of 15 s per £100 for the whole. Perry, who examined your " premises when out to see Valois' mills, tells me this is a low " rate for your property." Cette preuve ou semi-preuve ainsi acquise au Demandeur est entièrement détruite par l'absence de preuve que Champion fût *aucunement* autorisé à écrire cette lettre pour Routh, et ce dernier contredit *la lettre* de Champion en affirmant " qu'il n'est pas à sa connaissance qu'aucun employé " de la compagnie ait visité les lieux avant l'émanation de la " police." Perry jure qu'il n'a jamais visité les lieux en question, ni leur contenu, de la part de la Défenderesse. Et il raconte qu'en septembre, 1859, ayant eu à visiter les propriétés de

Valois à Ste Scholastique, pour la compagnie, Narcisse Valois lui dit que le Demandeur serait peut-être dans le cas de se faire assurer, qu'il regarda aux bâtisses de derrière adjoignant la maison du Demandeur, mais que la disposition des lieux était telle qu'il ne voulut pas y arrêter son attention. " And " the risk was of such a nature that I paid no more attention " to it." Et puis : " I never told Routh, the Defendant's agent, " at any time previous to the fire, that I had seen the premises " in question ; and I know he was ignorant of the fact." Il affirme en outre que la seule personne du bureau de la Défenderesse à qui il a parlé des bâtisses du Demandeur, est Alexandre McKenzie, en lui faisant rapport de sa visite de la propriété des Valois, et que ça été pour lui dire que si une application était faite pour assurer les propriétés du Demandeur, il ferait mieux ne pas la prendre " he had better not effect it." En présence du témoignage de Routh, Brault et Perry sur ce point, contredisant pleinement et en tout point la lettre de Champion, il est impossible d'accorder au Demandeur l'avantage et les inductions qu'il veut en tirer. Le moins qu'il eût pu faire aurait été de produire comme témoin Champion pour lui faire expliquer qui l'avait autorisé à écrire cette lettre au Demandeur, et s'il en avait jamais parlé à Routh ou autres employés de la Défenderesse. Quant au plus grand danger d'incendie qui pouvait résulter effectivement de ce que cette bâtisse en bois, au lieu d'être occupée comme magasin, l'était pour partie comme cuisine en hiver et en été, et par là pouvait donner lieu à de plus grands risques pour toutes les bâtisses et choses mentionnées dans la police d'assurance, le Demandeur a fait entendre plusieurs témoins qui prouvent que cette bâtisse et la maison en brique ne faisaient qu'un même corps de bâtisse, et que cette cuisine ou partie du magasin extérieur occupée comme telle, n'augmentait en aucune manière les risques du feu, pas plus que si la cuisine eût été dans la maison même ; mais, d'un autre côté, il est bien prouvé par Routh, Brault et Perry, qui sont des personnes qualifiées et compétentes à donner un bon témoignage sur ce point, que le risque était plus grand. Et il faut en effet reconnaître qu'il ne peut y avoir de doute qu'une bâtisse en bois où l'on fait la cuisine, doit nécessairement offrir plus de risque, que si elle sert uniquement à y mettre des marchandises ou si elle ne sert que de *store-room*. La négligence possible d'une fille servante, le soin des cendres, le feu le matin avant le soleil levé, et le soir après soleil couché, le dépôt des cendres et du bois, des chandelles ou lumières à peu près constamment matin ou soir, sont toutes des occasions plus prochaines d'incendie pour une cuisine et qui n'existent pas pour un magasin, et je puis ajouter que si la cuisine eût été dans la maison même, la surveillance du

maître et de la maîtresse sur la fille de la maison doit être plus sûre et plus effective que dans le cas d'une cuisine en dehors du corps principal de logement, et c'est ainsi que l'on peut répondre à ce que le Demandeur disait que, dans toutes les maisons, il y a une cuisine et qu'il était indifférent où elle fût placée; cela n'est pas exact, l'appartement destiné pour une cuisine, peut entraîner des risques différents ainsi que je viens de le démontrer. Mais, dit le Demandeur, il est établi que le feu avait originé dans le magasin ou la cave du magasin, et que, par conséquent, la cause du feu ne pouvait être attribuée à la circonstance qu'il y avait une partie de la bâtisse en bois occupée comme cuisine, il s'ensuit que la Défenderesse ne peut lui opposer la fausse représentation qui lui a été faite par le Demandeur de la désignation et description des bâtisses. C'est ici que la question devient plus difficile à résoudre, la Défenderesse prétendant qu'il est indifférent que la cause de l'incendie ait originé dans la bâtisse en bois ou dans le magasin; de même, dit-elle, qu'il est également indifférent que le Demandeur ait été de bonne foi ou de mauvaise foi dans la désignation ou description des bâtisses. Que le contrat d'assurance est un contrat de droit étroit et qu'elle avait intérêt et le droit de savoir par la description qui lui était donnée, tous les risques de quelque nature qu'ils fussent qui pouvaient résulter de l'occupation ou de la destination d'aucune partie des choses assurées afin de mesurer sur ces risques la prime qu'elle avait droit de demander sur le montant assuré et les choses assurées. Qu'elle eût cet intérêt, cela me parait bien clairement résulter de ce que je viens de démontrer, que l'occupation d'une partie de la bâtisse comme cuisine plutôt que comme magasin, entraînait des dangers d'incendie plus grands et plus prochains. Que la Défenderesse ait le droit de refuser de payer le montant de la perte de l'assuré dans un cas semblable, c'est ce que je vais rechercher, en ayant recours aux auteurs qui ont traité ces questions, ainsi qu'aux jugements et précédents de nos cours. Dans une cause de *Racine* vs. *The Equitable Insurance Company of London,* (1) que j'ai jugée le 31 décembre 1861. j'ai eu l'occasion de citer une autorité du 3e vol. de Pothier. *Traité du contrat d'assurance,* Nos 198-99, que je rapporterai ici. Il dit: " La bonne foi ne permettant aux " parties de ne rien cacher sur les choses qui font la matière " du contrat, il s'ensuit que l'assuré est obligé de déclarer aux " assureurs la qualité des marchandises qu'il fait assurer, " qui les rend sujettes à plus de risques." Et je dis que, de même et pour la même raison, l'assuré est tenu de déclarer les circonstances qui peuvent augmenter les risques des bâtisses

(1) *Suprà*, p. 131 et 10 R. J. R. Q., p. 185.

assurées. Car il faut appliquer au contrat d'assurance actuel les règles que Pothier reconnaissait exister pour le contrat d'assurance maritime dont il traitait. La raison est la même et il faut le reconnaître avec nos meilleurs auteurs sur ce point. Puis il continue, au n° 199 : " L'obligation que la bonne foi " impose aux parties, de ne rien dissimuler de ce qu'elles savent " sur les choses qui sont de la substance du contrat, ne con- " cerne ordinairement que le for de la conscience. Il en est autre- " ment de l'obligation qu'elle impose à chacune des parties, " de ne pas induire l'autre en erreur par de fausses déclarations " sur les choses qui sont de la substance du contrat : celle-ci " concerne le for extérieur. Ces fausses déclarations peuvent " donner lieu dans le for extérieur à faire prononcer la nullité " du contrat. Cela a lieu, quand même l'assuré aurait fait, " *sans mauvaise foi*, cette fausse déclaration, étant lui-même " dans *l'erreur*.... Car il y a cette différence dans tous les " contrats intéressés, entre le cas auquel l'une des parties ne " dit pas ce qui est, et le cas auquel elle dit ce qui n'est pas. " Dans le premier cas, elle n'est pas tenue de ne l'avoir pas dit, " si elle ne le savait pas, et si elle ne l'a pas malicieusement " dissimulé ; mais dans le second cas, elle est tenue, si ce qu'elle " a dit ne se trouve pas véritable, et a induit l'autre partie en " erreur ; *debet præstare rem itâ esse ut affirmavit.*" Cependant il ajoute que si la partie avait su elle-même la fausseté *elle ne serait pas recevable à s'en plaindre.* Mais, dans le cas présent, j'ai démontré plus haut que d'après la preuve la Défenderesse ne connaissait pas et ne pouvait connaître la fausse représentation qui lui était faite de l'état des lieux et de ce à quoi ils étaient destinés et employés. Je cite maintenant Boulay-Paty, sur Emerigon, vol. 1, p. 16-17 &c. : " Tous nos auteurs dit-il, " s'accordent à dire que le contrat d'assurance est un contrat " de droit étroit. Si l'une des parties a usé de dol et d'artifice, " la moindre peine qu'elle doive encourir, c'est que l'assurance " soit déclarée nulle à son égard. On est *coupable de dol vis- " à-vis des assureurs non-seulement* lorsque, pour se procurer " des assurances ou pour les inviter à se contenter d'une *prime " moindre,* l'on affirme ou l'on fait entendre des faits contraires " à la vérité, *mais encore* lorsque l'on dissimule des circon- " stances *graves* qu'il leur eût été important de connaître avant " de souscrire la police. Il en est de même si l'assuré *a omis,* " quoique par *inadvertance,* de déclarer quelque circonstance " essentielle qu'il importait aux assureurs de connaître *avant* " de signer la police. Dans tous ces cas l'assurance est nulle." Quénault, n° 373 : " L'erreur qui tombe sur la substance de l'objet du contrat est en effet par elle-même une cause de nullité. Or, on doit regarder comme substantielles dans le contrat d'assurance, toutes les circonstances qui peuvent aug-

menter ou changer les risques dont se charge l'assurance. L'opinion du risque est ce qui détermine le consentement de l'assureur. Si la spécification de la chose assurée et des risques, faite par l'assuré dans la police, n'en a donné qu'une fausse opinion à l'assureur, l'assurance doit être annulée, *comme n'ayant été consentie que par erreur.*" J'ai dit plus haut que les principes qui s'appliquent au contrat d'assurance maritime s'appliquent également au contrat d'assurance de bâtiments ou d'immeubles. Boudousquié nous l'enseigne, aux Nos 109, 111, 115 de son Contrat d'assurance, où il enseigne aussi la même doctrine que je viens de citer de Boulay-Paty comme entraînant la nullité de l'assurance. Soit que la fausse représentation ou désignation soit le fruit de mauvaise foi ou simplement une erreur, une négligence de la part de l'assuré, dans les deux cas, elle entraîne la nullité de l'assurance, et, pour mieux rapporter ce qu'il pense de ce qui peut constituer une fausse représentation, je vais citer ses propres expressions, les voici : " L'assuré doit donc " déclarer à l'assureur la nature desobjets qu'il fait assurer, celle " des constructions, la *désignation* des bâtiments, les profes- " sions qu'on y exerce, les denrées ou *matières hazardeuses* qui " y sont renfermées ; *leur communication, leur rapprochement* " *ou leur réunion avec d'autres bâtiments ou d'autres objets* " *d'un risque plus grave.*" Peut-on dire sérieusement que le feu d'une cuisine, le bois, les lampes, les lumières et les cendres qui y sont ordinairement ou continuellement, ne sont pas réellement de ces matières hazardeuses auxquelles l'auteur référait ou pouvait référer dans ce passage. Certainement qu'il faut le reconnaître ; seulement il faut y faire la distinction résultant des choses, des lieux et des circonstances. Je pourrais multiplier les citations sur ces points en citant Grûn et Joliat, Ellis, Quénault. Mais je me contenterai de citer Alauzet, Vol. 1, No. 494 : " La déclaration inexacte peut être le fruit de la *fraude* ou de *l'erreur ;* dans l'un et l'autre cas l'assurance serait nulle." Cette décision est sévère pour l'assuré, peut-être, mais une décision contraire serait injuste pour l'assurance et pourrait, en outre, favoriser la fraude. La contre-partie de la règle de droit qui veut que l'erreur qui tombe sur le sujet, la nature et l'étendue des risques soit une cause de nullité de l'assurance, est en ceci, que les compagnies d'assurance n'osent pas faire des contestations mal fondées, parce qu'un pareil système éloignerait les pratiques de leurs bureaux, et c'est réellement la plus sûre protection que l'honnête assuré puisse avoir, lorsqu'il souffre par une perte réellement accidentelle. Je vais en venir maintenant à la considération d'un autre moyen du Demandeur qui consiste à dire qu'il était prouvé que le feu n'avait pas originé dans la bâtisse dont partie était occupée en cuisine, et que, par conséquent, la Défenderesse ne pouvait pas

être reçue à se plaindre, n'ayant pas souffert le sinistre par suite de la fausse représentation du Demandeur. Mais ce dernier ne peut non plus réussir avec cette réponse pour repousser le plaidoyer de la Défenderesse, parce que la nullité de la police, en ce cas, ne dépend pas du fait que l'incendie a eu lieu ou n'a pas eu lieu dans une partie désignée exactement ou imparfaitement des lieux, bâtisses et choses assurées ou de leur contenu. Cela est indifférent. Et voici ce que Boudousquié nous enseigne là-dessus, au No. 119; "Dans tous les cas où le consentement donné par l'assureur est le résultat d'une erreur " produite soit par la négligence, soit par la fraude de l'assuré, " celui-ci est *non recevable* en cas de sinistre à *réclamer l'indemnité*, lors même que ses réticences ou ses fausses déclarations auraient été sans influence sur le sinistre, et que la " chose aurait péri, par d'autres circonstances que celles qui " ont été omises, dissimulées ou dénaturées." Boulay-Paty, Droit commercial, Vol. 2, p. 87, dit: "L'Assurance est nulle, " même dans le cas où la réticence, la fausse déclaration ou la " *différence* n'auraient pas influé sur le dommage ou la perte " de l'objet assuré." Et il ajoute, à la page 88: "L'ordonnance de la marine n'avait, il est vrai, aucune disposition à cet égard. Cependant cet article de la loi nouvelle est moins une addition à l'ordonnance qu'un sommaire des maximes qu'elle avait consacrées. Son célèbre commentateur disait que tout ce qui tend à augmenter le risque doit être déclaré par l'assuré dans la police, et que cette déclaration doit être conforme à la vérité, *sous peine de nullité* de l'assurance, suivant toutes les circonstances." Enfin le Demandeur invoque un jugement de la Cour d'Appel dans la cause de *Casey* et *Goldsmid*, (1) par lequel il aurait été maintenu que, dans l'espèce rapportée, la police d'assurance ne serait pas déclarée nulle et l'assuré privé du droit de recouvrer sa perte, par cela que la description des bâtisses assurées n'était pas précisément telle qu'elle avait été donnée par l'assuré, et qu'il n'était pas prouvé d'ailleurs que le feu avait été occasionné, ou avait été communiqué, par ce qui avait été omis d'être mentionné par l'assuré dans sa des-

(1) Une police d'assurance, dans laquelle la propriété assurée est décrite comme étant une maison bornée en profondeur par un hangar en pierres couvert en fer-blanc et par une cour où l'on construit un hangar de première classe qui devra communiquer avec la maison assurée, n'est pas incorrecte ni nulle, quoiqu'il ait été prouvé qu'entre la maison et le hangar il y eût un autre bâtiment couvert en bardeaux et communiquant par des portes aux deux autres bâtiments, attendu que le fait de n'avoir pas mentionné ces portes dans la description n'a pas été prouvé être le résultat de la fraude et qu'il n'a pas été établi que le feu se soit communiqué au moyen de ces ouvertures. (*Casey* et *Goldsmith*, C. B. R., Québec, 18 janvier 1854, ROLLAND, J., PANET, J., AYLWIN, J., *dissident*, et MONDELET, J., cassant le jugement de C. S., Québec, 30 janvier 1852, BOWEN, J. en C., DUVAL, J. et MEREDITH, J., 3 R. J. R. Q., p. 144.)

cription des choses assurées. L'on remarquera, de suite, que l'un des quatre Juges composant le tribunal, le juge Aylwin, ne concourut pas à ce jugement, et que le jugement infirmé avait été rendu à l'unanimité par la Cour Supérieure, alors composée de trois Juges, dont deux maintenant sont membres de la Cour d'Appel : le Juge-en-Chef Duval et le Juge Meredith. Mais il y a plus, une question de semblable nature a été portée devant le Conseil Privé, dans la cause de *Gibb et al.* et *The Beacon Fire and Life Insurance Company.* (1) Dans cette cause, une des conditions de la police était que, si le vapeur pour lequel l'assurance était prise, avait à son bord en aucun temps plus de 20 livres de poudre, la perte du vapeur par incendie ne serait pas payée, l'accident par le feu était arrivé lorsqu'il y avait à son bord plus de 20 livres de poudre. C'était un appel d'un jugement de la cour d'appel à Québec, qui avait rendu un jugement dans le même sens que celui de la cause de *Casey* et *Goldsmid.* Lord Chelmsford, en prononçant le jugement, le 3 décembre, 1862, s'exprima sur ce point qui nous intéresse comme suit : "Two of the Judges, who were in favor of the " Respondents, were of opinion that the word 'premises' was " applicable in the seventh condition to the case of a steamer, " but their decision proceeded on the ground that a policy of " insurance was a *contrat aléatoire,* which must be carried out " in good faith, and that the Company could not be relieved " from their responsibility to answer for the loss without proof " of deception and fraud, and a further proof that the fire had

(1) Gibb et autres avaient fait assurer par la Compagnie d'Assurance Beacon une somme de £1000 sur un bateau à vapeur, le *Tinto*, leur propriété. La police, souscrite sur une formule relative aux maisons et autres bâtiments terrestres, stipulait, entre autres conditions, que si, au moment de la destruction, il y avait *sur les lieux* '*on the premises*' plus de vingtlivres de poudre, la perte du bateau par l'incendie ne serait pas payée. Le 17 juillet 1850, le *Tinto* fut consumé par le feu, ce vaisseau ayant alors à son bord une quantité de poudre plus grande que celle stipulée. Sur refus de payer l'indemnité, Gibb et autres assignèrent la Compagnie d'Assurance. Cette dernière plaida par une défense au fond en fait et une exception péremptoire en droit alléguant qu'en vertu de la condition ci-dessus mentionnée elle n'était pas responsable de la perte du vaisseau. La cause fut entendue par le jury qui rendit un verdict en faveur des Demandeurs, décidant que la poudre qui se trouvait à bord du bateau, au moment de sa destruction, faisait partie de la cargaison, et que la police n'empêchait aucunement les propriétaires du vaisseau de la transporter comme fret. La compagnie fit alors motion, en Cour Supérieure, pour le rejet de la partie du verdict ayant trait au transport de la poudre comme fret, prétendant que cette partie était non pertinente à la cause, illégale et irrégulière. Le 1er juin 1859, la Cour Supérieure, accorda la motion et rendit jugement en faveur de la Compagnie d'Assurance. Sur appel, la Cour du Banc de la Reine (Lafontaine, J. en C., MONDELET, J., BADGLEY, J., DUVAL, J., dissident, et AYLWIN, J., dissident) infirma le jugement de la Cour Supérieure. La Compagnie d'Assurance appela de cette dernière décision au Conseil Privé, qui, le 3 décembre 1862, cassant le jugement de C. B. R., a jugé que la condition en question était applicable au vaisseau assuré. (8 R. J. R. Q., p. 476.)

" extended by reason of more than the limited quantity of gun " powder being on board. There was not the slightest ground " for suggesting any deception or fraud. And, as to its being " necessary to give proof that the fire had extended by reason " of a breach of the condition, *this seems to introduce into the* " *contract an entirely new term*.... If the condition is not " considered part of the contract, this strange consequence will " follow.... this steamer might, during the whole continuance " of the policy, carry cargoes of gun powder (the policy res- " tricting her to 20 lbs.) the Company receiving no premium " for the additional risk incurred. Under these circumstances, " it is quite immaterial whether the fire was or was not occa- " sioned by more than the specified quantity being on board." " It is familiar law that a wilful deviation, although the loss " is not occasioned by or attributable to it, exonerates the un- " derwriters from responsibility. So, again, take a life policy. " We know that in England these policies invariably contain " a stipulation that the insured is not to go beyond the limits " of Europe. Now if the party insured goes, even for an instant, " out of Europe, though without the least injury to his health, " this condition of the policy attaches, and the policy becomes " void." Ce jugement de la plus haute Cour dont nous devons prendre et recevoir les décisions comme fixant la jurisprudence pour les Cours Inférieures, a eu l'effet de renverser virtuellement la doctrine qui semblait avoir été établie par le jugement de la Cour d'Appel, en 1854, dans la cause de *Casey* et *Goldsmid*. Je dois donc en venir à la conclusion que le Demandeur ayant, quoique sans aucune intention frauduleuse, ainsi que je le crois, (il n'y en a pas de preuve d'ailleurs), donné une désignation ou description de cette bâtisse en bois adjoignant la maison de brique, fautive et erronée, quant à la destination de partie d'icelle, a, par cela même, perdu et forfait tout avantage qui pouvait lui résulter de sa police d'assurance. Quant au premier plaidoyer, par lequel la Défenderesse se plaint que le Demandeur ne lui avait pas fourni des états de sa perte, ainsi qu'il y était tenu, et qu'elle avait droit d'avoir, je ne crois pas qu'il soit prouvé ou fondé. Mais il en est autrement du plaidoyer par lequel elle se plaint que le Demandeur a frauduleusement grossi et exagéré sa perte; la preuve faite par la Défenderesse sur ce point justifie ses prétentions, et j'aurais été obligé de reconnaître que les états qu'il avait fournis, de la perte par l'incendie de son mobilier, étaient faux et exagérés. Mais comme je l'ai déjà dit, il n'est pas devenu nécessaire de me prononcer sur tous ces points. J'ai jugé sur le plaidoyer, qui, bien que le dernier enfilé, aurait dû l'être le premier, sans l'excuse que la Défenderesse a fait

valoir pour être admise à le produire après les trois premiers plaidoyers.

" La Cour, considérant que, par le contrat ou police d'assurance intervenu entre les parties, le 26 novembre, 1859, en la cité de Montréal, et particulièrement par les conditions premières et secondes au dos de la police d'assurance ou contrat, il a été stipulé que, dans le cas d'incendie, l'assuré, le Demandeur, n'aurait droit à aucune indemnité pour sa perte, s'il se trouvait aucune fausse déclaration ou fausse représentation dans la désignation ou description des bâtisses ou choses assurées, quant à leur construction, situation, ou quant à l'occupation et destination d'icelles: Considérant que telles clauses ou conditions sont valables et obligatoires en loi, et obligent l'assuré strictement à leur observation et à leur accomplissement, à peine de nullité du contrat d'assurance, soit que les fausses déclarations ou fausses représentations soient frauduleuses et intentionnelles, ou qu'elles soient seulement le fruit de l'erreur ou de la négligence, la loi ne faisant ou reconnaissant aucune différence en pareil cas: Considérant que, dans la description ou désignation donnée par le Demandeur à la Défenderesse, des bâtisses et choses qui faisaient l'objet du contrat d'assurance intervenu entre eux, comme susdit, le 26 novembre, 1859, il y a eu fausse déclaration de la part du Demandeur quant aux deux derniers items mentionnés en la police comme suit: " One wooden building in rear and adjoining the above store " and house, on goods therein of similar description:" Considérant qu'il est établi par la preuve, que cette bâtisse en bois ci-dessus mentionnée était pour partie, tant en hiver qu'en été, occupée comme cuisine, et renfermait et contenait aussi ordinairement d'autres choses et objets que des marchandises, ce qui était, dans ce cas, la suppression de faits ou circonstances que la Défenderesse avait intérêt et droit de connaître avant de consentir le contrat d'assurance: Considérant qu'il n'y a pas lieu de prononcer sur le mérite des trois exceptions ou plaidoyers de la Défenderesse, en premier lieu plaidés, attendu que le jugement porte sur le dit plaidoyer supplémentaire: Considérant qu'à raison de tout ce que dessus, la Défenderesse est bien fondée dans les prétentions par elle émises en son plaidoyer supplémentaire, par lequel elle demande que le Demandeur, pour ces raisons, ne soit point reçu à retirer aucun avantage de la police ou contrat d'assurance, pour être indemnisé de ses pertes par suite de l'incendie des bâtisses et choses assurées par la police, ainsi que mentionné en la déclaration, et que le contrat d'assurance soit déclaré nul, a accordé et accorde les conclusions dudit plaidoyer, et déclare le contrat d'assurance du 26 novembre, 1859, intervenu entre les

parties, nul à toutes fins que de droit, et le Demandeur non recevable en son action, laquelle est déboutée. (15 *D.T.B.C.*, p. 1.)

MOREAU et OUIMET, pour le Demandeur.

BETHUNE, C. R., pour la Défenderesse.

HONORAIRES D'HUISSIER.

CIRCUIT COURT, Quebec, 20 novembre 1864.

Before TASCHEREAU, Justice.

BOSWELL, Plaintiff, *vs.* BELFIAN, Defendant.

Jugé : Qu'il ne sera pas permis à un huissier de charger un transport du lieu de sa résidence à l'endroit où un writ signifié par lui est rapportable ; et il ne lui sera pas permis non plus de charger pareil transport pour remettre des argents prélevés sous exécution, tel huissier étant tenu, dans le premier cas, de transmettre son rapport par la malle et, dans le second, de faire remise des argents par un ordre du bureau de poste.

The Plaintiff was a resident of Quebec, and Defendant of Arthabaskaville, in the district of Arthabaska. The Defendant having made purchases from the Plaintiff, at Quebec, an action was brought against him, before the Circuit Court here, the bailiff for the district of Arthabaska to whom the writ was addressed thought it necessary to bring his return down in person, and a writ of execution having subsequently issued, and moneys levied under it, the same officer brought the money down himself and, on both occasions, charged full mileage. The Plaintiff took exception to this, and submitted the question of taxation to the clerk of the Court, who struck off these charges, the bailiff, not satisfied with the decision, submitted the matter to the court, who confirmed the decision, stating that, in the case of a service, the return ought to be sent by mail and, in the case of moneys levied under execution, these should be remitted by money order ; the bailiff being entitled to charge mileage from his residence to the nearest post-office. (15 *D. T. B. C.*, p. 22.)

PARKIN and PENTLAND, for Plaintiff.

TALBOT and TOUSIGNANT, for Bailiff.

DEPENS.

SUPERIOR COURT, Quebec, 5 december 1863.

Before TASCHEREAU, Justice

THE QUEBEC BANK, Plaintiffs, *vs* ROLLAND *et al.*, Defendants.

Jugé: Qu'en accordant une application pour remettre un procès par Jurés, lorsqu'il appert de mauvaise foi, la cour condamnera aux dépens la partie agissant de mauvaise foi, quoique la motion pour ajournement soit faite par l'autre partie.

In the month of April, 1863, this case came up for hearing before Mr. Justice TASCHEREAU and a special jury. The Plaintiffs having declared themselves ready to proceed, an application was made on the part of Defendant for postponement of the case, with costs against Plaintiffs, owing to the absence of material witnesses, viz: the cashier and teller of the Plaintiffs' Bank. This application was supported by affidavits that the witnesses had been regularly summoned, but had not appeared, nor had any reason been given for their non-appearance; upon this application, the hearing of the case was postponed and the costs taxed against Plaintiffs. The Plaintiffs afterwards moved the court to revise the above ruling and to tax the costs against Defendants, they having been the parties in default.

HOLT, for Plaintiffs : The ruling of the court, in taxing the costs of the day against Plaintiffs, is erroneous and should be reversed. It has been the invariable custom of this court to award the costs of the day against the party unable or unwilling to proceed. When the case came up for trial, Plaintiffs were ready to proceed and the postponement of the case was the act of Defendants ; the fact that the absent witnesses were servants of and under the immediate control of the Bank, is not of a nature to justify the court in departing from its usual practice. If regularly summoned, the control and subjection they were under to the Bank cannot in the slightest degree excuse them in their disobedience to the summons commanding their appearance. The proper recourse of Defendants is against the witnesses individually. They are personally liable for whatever loss or damage has been sustained by Defendants, owing to their disobedience, and it is unfair and contrary to law to punish the Bank, for the negligence or default of its servants.

CASAULT, for Defendants : Costs are altogether in the discretion of the court and can be and are awarded to either party according to equity. In the present case although the application for a postponement of the trial came from Defen-

dants, Plaintiffs themselves were the real defaulters, for, although, in fact, the absent witnesses were servants of the Bank, the court should, considering the position they held in the institution, regard them more in the light of actual parties in the cause. Their non attendance, without any excuse being assigned for their absence, makes apparent the desire on their part to hinder and obstruct the progress of the cause and shows an absence of good faith; under these circumstances the ruling of the court is both legal and equitable, and as such should now be maintained.

JUDGMENT: Take nothing by the motion to revise. (15 *D. T. B. C.*, p. 23.)

HOLT and IRVINE, for Plaintiffs.

CASAULT, LANGLOIS and ANGERS, for Defendants.

ENCANTEUR.—RESPONSABILITE.

CIRCUIT COURT, Quebec, 25 novembre 1864.

Before STUART, Justice.

LAWLOR, Plaintiff, *vs.* FAGES *et vir*, Defendants.

Jugé : Que l'ordre, donné à un encanteur de ne pas vendre au-dessous d'un certain prix, n'est pas illégal, et que, si l'encanteur vend au-dessous du prix fixé, il pourra être poursuivi pour le recouvrement de la différence.

This was an action brought by Plaintiff, owner of a certain horse, against Defendant, an auctioneer and broker, of this city, for the recovery of the sum of fifteen pounds sterling, the value of the horse which Defendant had sold at a public auction, for fifteen pounds currency, contrary to Plaintiff's express directions and to Defendant's undertaking in that behalf. The Defendant pleaded the general issue, and, by peremptory exception: 1. That the limitation upon the auctioneer, as made by Plaintiff, was illegal, and 2. that the auctioneer was not bound to follow the instructions given him by Plaintiff. From the evidence it appeared that, in the month of August, 1864, Plaintiff sent to Defendant, a certain black pony, with the following written instructions; " Mr. Casey " will not let the pony go under fifteen pounds sterling." The Plaintiff's servant took the pony, with these instructions, to Defendant, who, after reading them, said: "That's all right." It further appeared that, on the day in question, Defendant was holding an auction of horses which had been exhibited at a fare held previously, and that, shortly after the arrival of Plaintiff's servant, Defendant offered Plaintiff's

pony for sale, at this public auction, and after receiving several bids, finally knocked him down to one O'Haire for £15 0 0 cy. The Plaintiff, afterwards, refused to accept anything less than £15 stg., and, for this amount, the present action was brought. MURRAY, for Plaintiff, maintained that the limitation of the price of sale was perfectly legal, and that there was nothing in it which could show any fraudulent intent on the part of Plaintiff, either to deceive the auctioneer or the public present at the auction. The auctioneer should not have kept it secret, it was his duty to have informed the public of this fact, and there were many ways of doing so. He might have reserved a bid for the owner, or have put the pony up at £15 0 0 stg. The auction itself, apart from the sale of the pony, was one of a special character, no conditions had been read or announced to the public; it was a sale of horses that had been exhibited at a public fair some few hours previous, and the different owners of the horses offered for sale had all a right to impose their own conditions of sale upon the auctioneer. There could be no doubt whatever that an auctioneer could be limited by a person sending him property for sale, and the only question was whether the limitation in this case was legally made or not. That a limitation such as the one proved was illegal could not be pretended, for it was distinctly laid down in the books: " That an order to an auctioneer not " to sell for less than a certain price is not illegal, and an " action will lie against the auctioneer for the breach of such " an order; such a direction does not imply that the limitation " should be kept secret at the time of the sale." (1)

HOLT, Q. C., for Defendant, answered that the evidence disclosed the following facts. Lawlor expressed a wish to Defendant that his horse should be put up at one of Defendant's regular auctions, adding that the price he wanted was £15 0 0 stg., to which Defendant answered that he did not think the pony would bring that price. The pony was among the horses advertized for sale by Defendant, and, on the morning of the sale, was brought down by Plaintiff's groom who handed to Defendant a slip of paper with Plaintiff's instructions, Defendant having glanced at the instructions said " all right." The pony was afterwards offered for sale, and cried to the full extent of Defendant's well known energy, but no higher bid than £14 10s cy, could be got, which was the offer of one O'Haire, the Defendant supposing this to be a friendly bid, (as the pony had stood in O'Haire's stables) and that the pony had been bought in, knocked the pony

(1) 14 *Meeson* and *Welsby*, p. 372; *Steele et al* vs. *Ellmaker*, 11, S. and R. 86; *Wolfe* vs. *Luyster*, 1 Hall, 146; *Hazuel* vs. *Dunham et al.*, 1 Hall, 655.

down to O'Haire for £15 0 0, and told Plaintiff's groom to take the pony home, meaning to his master's stables, but the groom, supposing Defendant meant to the stable of the apparent purchaser, took the pony to O'Haire's stables, who, after keeping him for a certain time, sold him. The Defendant had done his best to sell the pony and had got as high a price for him as possible. What was intended to be submitted to the court was, that Defendant had incurred no liability in the matter, inasmuch as Plaintiff had sent his pony to be disposed of at *public auction*, and, inasmuch as the written instructions handed to Defendant, at the moment of the sale, were of such a nature that Defendant could not legally be guided by them. It was admitted by both parties that Plaintiff's instructions were *not to let the black pony go* under £15 0 0 stg. Now it was of the essence of all sales and, particularly, of public sales by auction, that everything on the part of the seller should be perfectly fair and above board, and, upon this point, the french law was even more emphatic and distinct than the law of England; and no man offering his goods at a public sale was permitted to do anything calculated directly to mislead the public, who had a right to suppose, in the absence of any declaration to prevent their falling into error, that every bid, at an auction, was fair *and bonâ fide*, and, in fact, puffing was equally prohibited by the french and the english law. No imputation on the honor or character of Plaintiff was intended, all that was concluded on the part of Defendant was, that Plaintiff had mistaken the directions which it was necessary to give to the auctioneer, if he really intended to hold the latter for any departure from orders. The Defendant should have been directed to put the pony up at an upset price, the direction actually given *not to let the pony go under a certain amount* was illegal. The reasons for the distinction were so clearly and ably given in an authority to which the court was referred that it could hardly be necessary to do more than lay the authority before court. The case referred to was that of *Bexwell* vs. *Christie*, 1 Cowper, p. 395, in which it was held that: " *An action does not lie against an auctioneer for selling a horse at the highest price bid for him, contrary to the owner's express directions not to let him go under a larger sum named. Otherwise, if the owner had directed the auctioneer to set the horse up at a particular price and not lower.*"

Stuart, Justice: The Plaintiff sent his horse to Defendant, a public auctioneer, with a memorandum that the sale should not be made for less than £15 0 0 stg. The horse was sold for £15 0 0 cy., and the action is brought for the recovery of the difference. The Defendant cited the case of *Bexwell* vs

Christie, reported in Cowper, which he pretended was a paralled case to the present one. I do not think the cases at all similar. In the case cited, the sending of the horse was the act of Plaintiff himself, and his instructions to the auctioneer not to let him go under £15 0 0, were fraudulent, at a sale where the conditions were that property put up for sale should go to the highest bidder, but the present case is totally different. The Defendant, long before the sale, knew the price Plaintiff wanted, and, on the day of the sale itself, accepted the pony for sale, under the condition that Plaintiff should receive £15 0 0 stg. for him. No matter in what words Plaintiff's instructions were signified to him, he knew the intentions of Plaintiff, and, having accepted the sale of the pony, subject to certain conditions, he should have fulfilled these conditions, or have sent the pony back to his owner. It would not have been fraudulent on the part of Defendant to have fulfilled the instructions received from Plaintiff. He might have reserved a bid for plaintiff before commencing the sale, or he might have put the pony up at £15 0 0 stg., but, in no case, had he the right to sell the pony for any sum of money less than that subject to which he had accepted the sale. Besides this, if the case were similar in every particular, a direct contradiction of the above authority is to be found in 13 Meeson and Welsby, p. 372, in which it is distinctly laid down that an order to an auctioneer not to sell for less than a certain price is not illegal. Such an order does not imply a necessity on the part of the auctioneer to keep this condition secret, were it so, it clearly would be fraudulent. Or, such a condition would be a fraud upon the public bidding at any auction, where the conditions published previous to the commencement of the sale were, that property put up should be knocked down to the highest bidder. In the present case, the business done by Defendant, on the particular day in question, was rather a succession of auctions than one continued auction sale, no conditions were published at the commencement of the selling, and it was competent to the auctioneer to impose the conditions required by the owner of each lot of property put up or auctioned by him. The judgment must therefore be in favor of the Plaintiff. Judgment for Plaintiff. (15 *D. T. B. C.*, p. 25.)

MURRAY, for Plaintiff.

HOLT and IRVINE, for Defendant.

RELEASE

SUPERIOR COURT, Québec, 8 juillet 1864.

Before TASCHEREAU, Justice.

LEBOUTHILLIER *et al.*, Plaintiffs, *vs.* ROBIN, Defendant.

Jugé : Que le droit du cessionnaire d'un acquéreur de bonne foi pour le recouvrement par action personnelle contre les propriétaires enregistrés de la valeur de services nécessaires rendus pour sauver et équiper un vaisseau calé et naufragé, n'est pas perdu par le défaut de réserve de ce droit lors de la remise dudit vaisseau, faite en conséquence de la réclamation d'icelui par les propriétaires

The action was brought to recover from Defendant the sum of $745.48, paid by Plaintiffs to H. Dinning and Co., shipbuilders, for docking and refitting the schooner "Gleaner" in their shipyard, where she was placed for that purpose by Defendant in the autumn of 1861. The vessel had previously fallen into the hands of Defendant under the following circumstances. In the summer of 1861 the "Gleaner" was in the possession of Plaintiffs, as registered owners, insured by them for £1800 stg., and sent, with a cargo of salt and other goods, in charge of a competent master, with a supercargo on board, to the River Moisie, on the North Shore of the St. Lawrence; while on her voyage, she was stranded in a fog, on a reef of rocks, and there remained in a dangerous and exposed position, and all attempts to get the vessel off being unsuccessful, the master and supercargo considered it to be the interest of all concerned to sell her as she lay, and the hull and part of the apparel were sold at auction, for the sum of £89, to Turgeon and Ouellet and David Têtu. This amount was paid Plaintiffs, by a draft accepted by them, and honored at maturity. After this sale, the weather moderated, and the purchasers, with assistance, succeeded in raising the vessel and conveying her to the beach, where, as well as at the River Moisie, temporary repairs of such a nature were effected as enabled them to bring her, first to River Ouelle, and thence to Québec, where she was purchased by Defendant, as a wreck, for the sum of £750 cy., the vendors undertaking by the bill of sale to transfer to him the register. The Defendant then placed her in charge of H. Dinning & Co., to be refitted and rendered seaworthy. While she was thus being refitted, Plaintiff sued out a writ of revendication, seized the vessel in the hands of Defendant, and claimed her as their property. Neither Defendant's vendors nor himself having ever held the register, and Defendant being advised that his title was consequently defective, admitted the claim, and restored the schooner to Plaintiffs, who, to obtain possession, where com-

pelled to pay H. Dinning & Co., their bill for refitting her, and the present action was, as already stated, brought to recover from Defendant the amount so paid to the ship builders. To this action, Defendant pleaded the foregoing facts and alleged that Plaintiffs, in paying the sum demanded to Dinning & Co., alone profited by that payment, and, therefore, no action would lie against him for its reimbursement. At the same time, Defendant, as incidental-Plaintiff, instituted an action against Plaintiffs, to recover from them, as incidental-Defendants, the sum of £1125 cy., the increased value acquired by the vessel, through the services of Turgeon and Ouellet, and Têtu, the first purchasers who had, for the purpose, assigned all their rights to the incidental-Plaintiff, who, to his declaration of incidental demand, subjoined the usual assumpsit counts and a count for salvage. The incidental-Defendants pleaded to this cross-demand that the incidental Plaintiff, having admitted, in the action of revendication, that he was not the owner, and having restored the vessel, without any reservation of his rights, he had waived them, and could not now claim any indemnity for the increased value. The incidental-Plaintiff replied specially that such restoration could only be regarded in the light of a waiver of his having a privilege on the vessel, if any he had, but did not interfere with or injure his claim for the amount of his services and expenditure in saving and ameliorating her.

Austin, for Defendant and incidental-Plaintiff: In so far as relates to the principal demand, Defendant has fully subtantiated the facts set forth in his plea. As the vessel was abandonned as a total wreck and afterwards delivered up in an ameliorated and seaworthy condition to Plaintiffs, the payment by them to Dinning & Co., of the sum of $740.48 demanded by their action, was a payment by which they alone profited and, both in law and in equity, their action ought to be dismissed. Upon the incidental demand, incidental-Plaintiff contends that he has still a right to institute the present cross-demand, although he might have done so when the seizure of the schooner was effected, 1 Pigeau, p. 337, and 1 *R. J. R. Q.*, p. 130. (1) and that he is entitled, as the assignee of his vendors who acquired possession of the schooner in good faith, to indemnity, if not to the extent of the increased value acquired by the "Gleaner," for the services rendered in raising and repairing her by his assignors, at least, to the extent of the

(1) Si le Demandeur incident ne fait pas voir, dans sa déclaration, que sa demande incidente est liée à la demande principale, le Défendeur doit s'en prévaloir par exception à la forme, et, s'il ne le fait pas, il renonce par là à se prévaloir de cette irrégularité. (*Turner et al.* vs. *Whitfield*, C. B. R., Québec, 20 avril 1811, Sewell, J. en C., 1 *R. J. R. Q.*, p. 130).

value of these services, and to the amount thereby expended, as well by his assignors as by himself. (1) With regard to the plea to the incidental cross-demand, although incidental-Plaintiff has restored the schooner upon receiving notice of Plaintiff's claims to her, such restoration can only be regarded as a waiver by him of his lien or privilege, if any he had upon her, for his and his assignor's services, and not as the renunciation of his claim to idemnity. (2)

JUDGMENT: The court, considering that it is established by evidence that Plaintiff's schooner "Gleaner," while on a voyage to the River Moisie, under charge of a competent master and supercargo, was accidentally wrecked; that, afterwards, in good faith and with due formality, with the approbation of the owners and supercargo, she was sold to Turgeon & Ouellet, and to one D. Têtu, and that the sale was in the interest of all concerned, and, further, that the purchasers took possession of her and paid the sum agreed upon by a draft accepted by Plaintiffs, and that the sale was thus ratified by them; considering that the money expended by Turgeon & Ouellet and Têtu, in repairing the schooner rendered her worth, when brought to Quebec by them, the sum of £750 0 0, and that, for this sum, she was, with her furniture, purchased in good faith by incidental-Plaintiff, and so came into his possession, and further that Turgeon, Ouellet and Têtu, by deed of conveyance made over to incidental-Plaintiff all their right, title and interest for the recovery of £397, due them for expenses incurred in raising and repairing her; considering, further, that, in the condition in which the schooner was brought to Quebec and sold to incidental-Plaintiff, she was altogether unseaworthy, and that, for further and necessary repairs, she was placed by him in the shipyard of Dinning & Co., and that, for these repairs, there was payable to them by incidental-Plaintiff a sum of £250, for the balance of which the demand in chief is brought, incidental-Defendants having paid it under protest, and with a view of obtaining control of the schooner on which Henry Dinning & Co., had a lien to the extent of the said balance; considering that, afterwards, incidental Defendants obtained possession of her, by means of an action of revendication, and that, by the judgment in the said action, they were declared owners, without reserve to the now incidental Plaintiff, of his rights or privileges, and considering that the said judgment cannot, in any way, militate again his right to obtain from incidental Defendants, either by personal action, exception of compensation, or otherwise, the amount of the

(1) Poth. *Droit de Propriété*, Nos. 340-343-344-345-346-348-350-353.

(2) C. N., Art. 2102, Sec. 3; Poth, *Traité du Contrat de Dépot*, No. 74.

repairs and increased value acquired by the schooner through him, and those whose rights he holds, and that incidental-Plaintiff, in consenting that incidental Defendants should be declared owners of the schooner, without any reservation to himself, did not renounce his rights, but simply renounced his right of *lien*. And, further, that, on the 27th May, 1863, incidental Defendants, in virtue of the said judgment, without contestation, obtained possession of their schooner with the necessary repairs and furniture, the cost of which added to the sum of £89, the amount of the purchase money after the wreck, amounts to £1089 10; and considering that Plaintiffs in chief should only obtain their demand, on deduction from the sum due by them to Defendant in chief, doth condemn them to pay to Defendant in chief, as incidental-Plaintiff, the sum of £825, with interest and costs." (15 *D. T. B. C.*, p. 31.)

HOLT and IRVINE, for Plaintiffs and incidental-Defendants.

AUSTIN, for Defendant and incidental-Plaintiff.

CAUTIONNEMENT JUDICIAIRE.

BANC DE LA REINE, EN APPEL, Montréal, 6 juin 1864.

Présents : DUVAL, juge en chef, MEREDITH, MONDELET, DRUMMOND et BADGLEY, juges.

DUPONT *et al.*, Appelants, *et* GRANGE, Intimé.

Jugé: Que, lorsque le cautionnement est donné par deux cautions, sur appel de la Cour de Circuit à la Cour du Banc de la Reine, il n'est pas nécessaire que l'une ou l'autre déclare être propriétaire de biens-fonds de la valeur de £50, au-dessus de toutes charges, et que cela ne devient nécessaire que dans le cas où le cautionnement est donné par une seule caution, en vertu de la 20e Vict., ch. 44, secs. 61 et 62. (1)

Les Appelants ayant fourni, devant le greffier des appels, le cautionnement voulu par la loi, par deux cautions qui justifièrent de leur solvabilité, à la satisfaction du greffier, l'Intimé attaqua ce cautionnement, par motion, demandant qu'il fût déclaré insuffisant et nul, " faute par les cautions d'avoir justifié suivant la loi." A l'argument, DOUTRE, pour l'Intimé, fit reposer l'insuffisance alléguée du cautionnement sur le fait que, dans l'espèce, bien qu'il eût été donné deux cautions, aucune d'elles n'avait fourni le cautionnement du propriétaire de biens-fonds valant $200, en sus et au-dessus de toutes charges à prendre sur les dits biens-fonds ou les affectant, quoique la loi exigeât que l'une des cautions au moins, donnât la description d'une propriété de cette valeur,

(1) V. art. 1939 et 1962 C. C.

Lynch et *Blanchet (1)*. OUIMET, pour les Appelants, cita *Hearn* et *Lampson (2)*.

DUVAL, juge en chef : La Cour d'Appel a décidé il a longtemps, dans une cause *Vondenvelden* et *Wadley*, à Québec, que, lorsqu'il y a deux cautions, il n'est pas nécessaire d'hypothéquer une propriété. Motion de l'Intimé rejetée avec dépens. (15 *D. T. B. C.*, p. 36.)

MOREAU, OUIMET et CHAPLEAU, pour les Appelants.

DOUTRE et DOUTRE, pour l'Intimé.

ACTION HYPOTHECAIRE.—APPEL.

BANC DE LA REINE, EN APPEL, Montréal, 8 septembre 1865.

Présents : DUVAL, Juge-en-Chef, *dissident*, AYLWIN, MEREDITH, *dissident*, DRUMMOND ET MONDEDET, Juges.

DUPONT *et al.*, Appelants, *et* GRANGE, Intimé.

Jugé : Que l'action hypothécaire est de sa nature une action réelle, conséquemment sujette à appel, et que les parties ont droit de faire rédiger l'enquête par écrit. (3)

(1) Le cautionnement, donné dans un appel de la Cour de Circuit par deux cautions qui ont justifié de propriétés immobilières sans les désigner, est valide. (*Lynch* vs. *Blanchet*, C. S., Montréal, 31 octobre 1856, SMITH, MONDELET, dissident, et CHABOT, juges, 6 *D. T. B. C.*, p. 149.)

(2) Lorsque, sur appel de la Cour de Circuit à la Cour du Banc de la Reine, le cautionnement est fourni par deux cautions, il n'est pas nécessaire que ce cautionnement contienne la déclaration que les cautions sont propriétaires d'immeubles, cela n'étant exigé que dans le cas où le cautionnement n'est fourni que par une seule caution. (*Hearn* et *Lampson*, C. B. R., Québec, 20 septembre 1860, LAFONTAINE, juge en chef, AYLWIN, DUVAL, MEREDITH et MONDELET, juges, 8 R. J. R. Q., p. 432.)

(3) Sur appel de la Cour de Circuit à la Cour du Banc de la Reine dans une cause non sujette à appel, mais dans laquelle les parties avaient procédé comme si elle eût été sujette à appel, il a été jugé qu'en raison de l'irrégularité de la procédure et de l'absence de témoignages écrits et d'aucune articulation de faits ou inscription pour enquête ou audition, le jugement de la Cour de première instance serait confirmé. (*Osgood* et *Cullen*, C. B. R., Montréal, 3 mars 1860, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J. et MONDELET, J., 11 *D. T. B. C.*, p. 282.)

Dans la cause de la *Municipalité de la Paroisse de St. Philippe*, Appelante, et *Lussier*, Intimé, motion par ce dernier pour le renvoi de l'appel, parce que la somme réclamée par l'action ne dépassait pas $100 ; que le jugement a été rendu dans une action non sujette à appel ; que les dépositions des témoins n'ont pas été prises par écrit, etc. La Cour du Banc de la Reine (LAFONTAINE, J. en C., DUVAL, J., MEREDITH, J. et MONDELET, J., le 3 septembre 1863, a jugé qu'il n'y avait pas lieu à appel, lorsque les témoignages n'ont pas été pris par écrit dans la Cour de première instance. (13 *D. T. B. C.*, p. 499.)

Une action de la Cour de Circuit pour une somme moindre que $100 est sujette à appel, si le Défendeur, par son plaidoyer, met en question un titre à un immeuble. (*Gould* et *Sweet*, C. B. R., Montréal, décembre 1859, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., MEREDITH, J. et MONDELET, J., dissident, 8 R. J. R. Q., p. 67.

V. art. 1142 C. P. C. et 25 Vict., ch. 10, sec. 11.

L'action était portée devant la Cour de Circuit, dans le comté de Soulanges, par Thomas Grange, l'Intimé, contre un nommé Olivier-François Prieur, pour faire déclarer un immeuble, possédé par Prieur, hypothéqué au paiement d'une somme de 377, montant en principal et intérêt d'un jugement obtenu par l'intimé contre Jean-Régis Leblanc, le 14 mai 1855, Prieur appela en cause les Appellants, Dupont *et al.*, de qui il avait acheté l'immeuble, et ces derniers plaidèrent à l'action principale qu'ils avaient acquis l'immeuble en question de Jean-Baptiste Leblanc contre lequel le Demandeur n'avait aucune hypothèque. L'Intimé répondit à cette défense, et les Appellants, après avoir produit leur articulation de faits, demandèrent, cour tenante, que l'enquête fût prise par écrit suivant le Statut, et que la cause fût rayée du rôle des causes non appelables et placées sur celui des causes sujettes à Appel, vu qu'elle était appelable de sa nature. Cette demande fut rejetée *instanter*, et l'Intimé procéda à faire entendre ses témoins *vivâ voce*, et sans qu'il fût pris notes de leurs témoignages. Le 8 [illegible] 1864, jugement fut rendu, condamnant le Défendeur à délaisser, et les Appelants à indemniser et acquitter le Défendeur principal du montant de la condamnation. C'est de ce jugement qu'était appel. De la part des Appelants, il fut dit : 1° Qu'aux termes du Stat. Ref. du B. C., cap. 77, sec. 39, la cause soumise était de sa nature appelable ; 2° Qu'une action hypothécaire est une action réelle ; que le tiers détenteur était sujet à éviction ; que son titre pouvait être révoqué en doute, et qu'il pouvait être privé de la propriété même (1), et que, partant, en pareil cas, l'action était

(1) G avait intenté contre C une action en déclaration d'hypothèques, fondée sur une obligation datée du 9 mars 1848 et enregistrée le 15 novembre 1858 à neuf heures du matin, sous le No 10513. C opposa à cette action un acte d'acquisition de la propriété décrite dans l'obligation, daté du 14 novembre 1858, enregistré le même jour et à la même heure sous le No 10512 et plaida que son titre ayant été enrégistré antérieurement à celui de G, il était tiers-acquéreur *bonâ fide* et subséquent ; qu'en conséquence, il avait droit de faire déclarer que G n'avait plus d'hypothèque. La Cour de Circuit (district de Terrebonne, St. Jérôme, 21 janvier 1861, MONK, J.) rendit jugement en faveur de la Demanderesse, décidant que, dans l'espèce, le numéro d'enregistrement ne pouvait donner priorité et que le régistrateur aurait dû enregistrer d'abord le plus ancien acte en date, puisqu'ils avaient été tous deux présentés à la même heure. Sur appel, la Cour du Banc de la Reine. (LAFONTAINE, J. en C., dissident, AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J., dissident,) le 4 mars 1862, a infirmé le jugement de C. C. par le motif que les deux actes ayant été enregistrés en même temps, l'acte d'obligation du 9 mars 1848 se trouvait par ce fait n'avoir pas été enregistré avant l'acte de vente du 14 novembre 1858, et devait, en vertu de la sect. 1 du ch. 30 de l'ordonnance 4 Vict., qui décrétait que "tout titre ou instrument par écrit exécuté après le 31 décembre 1841 serait considéré comme nul et de nul effet à l'égard de tout subséquent acquéreur *bona fide*, pour ou sur valable considération, à moins que tel titre n'ait été enregistré avant l'enregistrement du titre, transport ou obligation notarié, sur lequel se fondera tel acquéreur subséquent," être

appelable ; (1) 3° Qu'aucun témoignage verbal ne pouvait être légalement produit contre le certificat de l'enregistrateur, lequel, dans l'espèce, constatait : " qu'il n'appert pas qu'il y ait " eu avant ou après le 27 janvier 1859, aucun jugement enre- " gistré dans ce bureau, dans une cause où Thomas Grange est " le Demandeur et Jean-Baptiste Leblanc Défendeur." De la part de l'Intimé, il fut prétendu : 1° Qu'il n'y avait aucun appel du jugement en question en la cause. Le Stat. Ref. B. C., cap. 83, secs. 95 et 182, ordonnait que, dans les causes appelables, dans la Cour de Circuit, les témoignages seraient rédigés par écrit, de même que dans la Cour Supérieure, mais, par la 25 Vic., cap. 10, sec. 11, il était ordonné que les témoignages, dans les causes appelables, Cour de Circuit, seraient pris de la même manière que dans les causes non-appelables, à moins que l'une des parties ne demandât que les témoignages ne fussent rédigés par écrit. Dans la cause, la motion pour faire rédiger les témoignages par écrit avait été faite le 7 juin, le jugement dont était appel était du 8 du même mois. 2° Que la cause ne tombait pas sous les dispositions du Stat. Ref., cap. 77, sec. 39. 3° Que la cause eut dû être évoquée avant d'avoir été portée en appel. (2) 4° Qu'à tout événement, la cour ne pouvait que renvoyer le record devant la Cour de Circuit, en ordonnant que la preuve y serait rédigé par écrit.

DUVAL, Chief-Justice, stated, in effect, that the question in the case involved only a small amount, but raised a question of some importance which had been much discussed by authors, whether an action *en déclaration d'hypothèque*, was or was not a real action. The Court below refused Defendant's motion to put the case for *enquête* on the appealable roll, and the evidence was taken orally. The majority of this Court held the action to be in its nature real, and, therefore, appealable. Judge MEREDITH and himself dissented, on the ground that the *hypothèque* was merely an accessory to the principal debt and must follow it. Marcadé said, that, if an *hypothèque* was held to be a *jus in re*, the *debt* must, in a succession, go to the *héritier mobilier*, and the *hypothèque* to the *héritier immobilier*. It was true. Pothier said, a *hypothèque* was a *jus in re*. The phrase must have escaped him, for in his latter works on community he called it otherwise.

considéré comme nul et sans effet à l'égard de l'Appelant, acquéreur subséquent et de bonne foi. (*Chaumont* et *Grenier*, 9 R. J. R. Q., p. 34 et 36.)

(1) 1 Nouv. Den., vbo. Action, par. 2, sec. 2 ; 6 Id. vbo., Déclaration d'hypothèque. Ces actions conviennent entr'elles par leur nature. Toutes les deux sont réelles parcequ'elles naissent également du droit qu'a le créancier sur la chose hypothéquée. 2 Bourjon, lib. 6, chap. 1, Nos 1 et suivants ; t. 1, p. 428, Nos 9 et 10 ; tit. 6, des hypothèques, p. 542 ; S. R. B. C., ch. 82, s. 2.

(2) Stat. Ref. du B. C., cap. 83, sec. 178.

AYLWIN, J., remarked that the principle on which he based his judgment was that in the event of there being a *délaissement*, the subsequent proceeding would undoubtedly be a real proceeding.

DRUMMOND, J.: When there is a property in question, that gives character to the action.

MONDELET, Juge: L'Intimé, ayant, en Cour de Circuit, (comté de Soulanges), porté contre les Appelants une action en déclaration d'hypothèque, pour $77, il s'est élevé la question de savoir si l'action devait être instruite comme une cause appelable ou non. Le 7 mars 1864, les Appelants ont produit des articulations de faits, du consentement de l'Intimé, et ont demandé, Cour tenante, que l'enquête fût prise par écrit, suivant le statut, et ont aussi demandé que cette cause fût rayée du rôle des causes non-appelables et placée sur celui des causes sujettes à appel, vu qu'elle est appelable de sa nature. La cour rejeta de suite cette motion, et le Demandeur procéda à la preuve orale. La principale raison que l'on oppose à la prétention des Défendeurs, est qu'ils auraient dû évoquer. Cette distinction me paraît insoutenable. L'action hypothécaire est une action réelle, elle naît du droit qu'a le créancier sur la chose hypothéquée. Je pense donc, que le jugement de la Cour de première instance est mal fondé. Cette Cour doit l'infirmer et renvoyer le dossier à la Cour de première instance, pour y être procédé comme dans une cause appelable. Il va sans dire que l'Intimé doit être condamné à tous les dépens.

JUGEMENT: "Considérant que l'Intimé, Demandeur en Cour de première instance, s'est pourvu contre les appelants par une action en déclaration d'hypothèque: Considérant que cette action en est une d'une nature réelle: Considérant que les Appelants étaient en droit de demander et d'obtenir de la Cour, qu'il fût procédé à prendre l'enquête par écrit, et de faire rayer la cause du rôle des causes non appelables sur lequel la dite cause avait été inscrite, attendu qu'elle est appelable de sa nature: Considérant que les Appelants ont régulièrement fait cette demande à la Cour de première instance, et que, de suite, la Cour l'a refusée: Considérant qu'à cet égard, et en ce refusant, la Cour de première instance a erré: Considérant que cette erreur de la part de la Cour de première instance, suivie d'un jugement au mérite doit avoir l'effet, et a l'effet d'entacher d'erreur le jugement final rendu par la Cour de première instance le 8 juin, 1865. Cette Cour casse et met de côté les dits jugements de la Cour de première instance, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour, annulle et met de côté comme nuls et non avenus tous les procédés en ladite Cour, depuis et compris le jugement du 7 juin, accorde la demande des Appelants et ordonne que la cause soit rayée

du rôle des causes non appelables et mise sur celui des causes appelables, pour être procédé suivant qu'il appartiendra, et cette Cour condamne l'intimé à tous les dépens tant en cette Cour qu'en la Cour de première instance. (16 *D. T. B. C.*, p. 146; 10 *J.*, p. 75 et 1 *L. C. L. J.*, p. 52.)

MOREAU, OUIMET et CHAPLEAU, for Appellants.

DOUTRE et DOUTRE, for Respondent.

INSCRIPTION EN FAUX.—CONSENTEMENT DES PARTIES.

SUPERIOR COURT, Quebec, 14 décembre 1864.

Before TASCHEREAU, Justice.

MCLIMONT, Plaintiff, *vs.* ROBIN, Defendant.

Jugé: 1o. Que le consentement des parties à une action qu'il ne sera pas produit d'inscription en faux contre le rapport d'un huissier, allégué par une exception péremptoire à la forme être faux, n'oblige pas; et tel consentement sera mis de côté par la Cour, sur application du Défendeur, auquel il sera permis de produire telle inscription.

2o. Que le seul moyen d'être admis à la preuve pour attaquer le rapport d'un huissier, allégué être faux, est par une inscription en faux. (1)

The original writ of summons was thus subscribed, "J.B.R. Dufresne, Deputy P. S. C." The copy left at the domicile of Defendant was signed thus, "signed, J.B.R. Dufresne, P.S.C.," omitting the word "Deputy" altogether. The Defendant believing the discrepancy between the original and the copy of the process of the court to be a fatal variance, lodged an *exception à la forme*, by which he alleged that the bailiff's return endorsed upon the original writ was false, inasmuch as the original was signed by Jean-Baptiste-Ricard Dufresne, *Deputy* Prothonotary of the Superior Court, whereas, in the copy certified to have been served upon Defendant, it appeared that the writ was subscribed by J. B. R. Dufresne, P. S. C., namely, as Prothonotary of the Superior Court. This copy was certified to be a true copy of the original by the attorney for Plaintiff, and by the return of the bailiff. The parties, with the view of avoiding the expense of an *inscription en faux* against the bailiff's return, consented, in writing, to submit the exception to the decision of the Court, without filing such *inscription en faux*, and, with that object, inscribed the cause upon the pleadings, but, before it was heard, Defendant, under an impression that the Court would, *ex officio*, require an *inscription en faux*, to justify it in setting aside an authentic *acte*, moved to annul the consent, to cause

(1) V: art. 79 et 159 C. P. C.

Plaintiff to declare whether he intended to use the return of the bailiff, and for leave to *inscribe en faux*; this application the Plaintiff resisted.

AUSTIN, for Defendant, observed that it was an error to suppose that the Court could set aside an authentic instrument without an *inscription en faux*, and contended that, as this was a question which affected not only the parties to the suit, but a public officer, one of the bailiffs of the Court, it was imperative that the proceeding which impugned his return, made under his official oath, should be of the solemn character contemplated by law; and that it would be an infringement of public order to admit proof against such return, even with the consent of the parties to the suit, without such *inscription en faux.* (1)

CAMPBELL, for Plaintiff, showed cause against the application and urged, that the present was not the subject of an inscription *en faux*, that it was not the bailiff who certified the copy of the writ, but the attorney of record, and that cap. 83, sec. 3, subsection 3, of Con. Stat., of Lower Canada regulated that point; that it was there provided that it should be the certificate of the attorney of the party suing out the writ that should give authenticity to the copy of the writ, and not any act or certificate of the bailiff, and, as no portion of the bailiff's return was controverted, and the only question was whether the omission of a useless word in the writ was fatal, it would certainly meet the ends of justice in trying so trivial a question that it should be done at as little expense as possible, and therefore that the consent given by parties should not be set aside. (2)

JUDGMENT: The court, considering that the return of the bailliff who served the process should be conclusive (*doit faire foi*) until an inscription *en faux* be filed, and that the only means that exists of proving that falsity of the return is by an

(1) L'exploit d'huissier est un acte authentique qui fait preuve, jusqu'à inscription de faux, de toutes les énonciations relatives aux faits que l'huissier a mandat de constater. Aucune preuve ne peut être permise contre l'exploit d'huissier, si ce n'est sur inscription de faux. Une seule copie de l'ordre et de la déclaration suffit pour l'ajournement du mari et de la femme séparés de biens. (*Trust and Loan Co. of Canada* et *MacKay*, C B.R., Montréal, 1 Décembre 1859, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J.. MEREDITH, J., et C. MONDELET, J., cassant le jugement de C. S., Montréal, 26 février 1859, BADGLEY, J., 7 R.J.R.Q., p. 322 et 327.)

(2) Le certificat des procureurs de l'une des parties en cause, apposé au bas d'une copie du jugement, à l'effet de déclarer que cette copie certifiée par eux est une vraie copie de ce jugement, n'est pas un *faux* dans le sens de ce mot et n'est pas reconnu comme tel par la loi. Le rapport de l'huissier, constatant la signification d'une telle copie de jugement ne constitue pas non plus un faux. (*Perry* vs. *Milne*, et *La Banque d'Ontario*, tiers-saisie, et *Milne*, contestant la saisie, C. S., Montréal, 22 mai 1862, BADGLEY, J., 10 R. J. R. Q., p. 323.)

inscription *en faux*; considering that the question in controversy is a question of public order, affecting, not only the rights of the parties interested, but those of the bailliff also; considering that the consent given by the parties is illegal, and may be resolved by either of them; the court grants the motion, declares the inscription upon the merits without effect, permits Defendants to inscribe *en faux* as required, and orders that, within eight days from the service upon Plaintiff of the present judgment, he do declare whether he intends or not to make use of the said return. (15 *D. T. B. C.*, p. 37.)

CAMPBELL and HAMILTON, for Plaintiff.

AUSTIN, for Defendant.

BREF DE SOMMATION.—SIGNATURE.

SUPERIOR COURT, Quebec, 4th February, 1865.

Before STUART, J.

MCLIMONT, Plaintiff, *vs.* ROBIN, Defendant.

Jugé: Que l'omission du mot "Député" avant les lettres "P. S. C." sous le nom d'un député protonotaire dans la copie d'un writ de sommation n'est d'aucune importance.

The facts of the case appear from the report of the cause, *supra*, p. 424. On motion by Plaintiff *en faux*: "That the "*moyens de faux* written and contained in the *inscription* "*de faux* of him the said Philip V. Robin be declared *rele-* "*vant, pertinent* and admissible."

STUART, Justice. said: The only question in the case is whether the omission of the word "Deputy" before the letters "P. S. C." at the foot of the copy of the writ is material or not. I think the letters "P. S. C." are not necessary; in England, an officer of the Court never gives his quality. I see no necessity for it here, and the omission of the word "Deputy" before useless letters, which may signify fifty things, can certainly not affect the copy of the writ, if the original is perfect. The rule is therefore discharged with costs. (15 *D. T. B. C.*, p. 101.)

AUSTIN, for Plaintiff *en faux*.

CAMPBELL and HAMILTON, for Defendant *en faux*.

ENREGISTREMENT.

Banc de la Reine, En Appel, Montréal, 6 juin 1864.

Présents : Duval, Juge-en-Chef, Meredith, Mondelet et Badgley, Juges.

Sicotte, Appelant, *et* Bourdon, Intimé.

Jugé : Que, dans le cas d'une dette assurée par hypothèque dûment enregistrée, pour une somme payable en dix ans, le débiteur s'étant depuis obligé à effectuer le paiement plus tôt, le tiers-détenteur poursuivi hypothécairement en recouvrement de cette dette, ne peut invoquer le défaut d'enregistrement du dernier acte, s'il ne fait pas voir que son propre titre a été enregistré antérieurement au second acte ci-dessus mentionné.

Le jugement dont était appel fut rendu par la Cour Supérieure du Bas-Canada, siégeant à Montréal, le 20 mai, 1863, en ces termes : " The court considering that Defendant hath not proved at what date he became proprietor of the lot of land described in Plaintiff's declaration : seeing that, by the deed of the 30th November, 1855, there was no novation of the obligation dated 18th October, 1852 : considering that, under the circumstances of the case, and seeing the pleas by Defendant made and filed therein, the present action is not premature ; doth reject the pleas firstly and secondly pleaded by Defendant." Ce jugement déclare ensuite un certain immeuble possédé par le Défendeur hypothéqué en faveur du Demandeur, et, sur ce, condamne le Défendeur à payer ou à délaisser, &c.

Meredith, Justice : The action in the court below was founded on a notarial obligation, bearing date the 18th of October, 1852, by which Jean-Baptiste Sicotte promised to pay 3000 *livres, ancien cours*, to Respondent, in ten years from the date of that obligation, and hypothecated certain real estate for that sum. This deed was enregistered the 10th November, 1852. Afterwards, by a notarial deed, dated the 30th November, 1855, the debtor undertook to pay the balance then remaining due upon the said sum of 3000 *livres*, namely, 1500 *livres*, to Respondent, in one year from the 18th day of October, 1855 ; and the action in the court below was for the recovery of the said sum of 1500 *livres*, and was directed against Appellant as the *détenteur actuel* of part of the real estate which had been so hypothecated by Jean-Baptiste Sicotte, in favour of Respondent. The Appellant, as Defendant, filed two pleas, a peremptory exception alleging novation, which he states, in his factum, was abandoned, and I think very justly. The second plea alleged that the action of Plain-

was premature, as, according to the original obligation, the debt claimed was not payable until October, 1862; and, in order to avoid the effect of the second deed, by which the debt was made payable in one year from the 18th of October, 1855, the Appellant alleged that that deed had not been registered. But he cannot derive any advantage from the non registration of his adversary's deed, because he has not alleged the registration of his own deed. (1) If Appellant had shown that his deed of sale, or other title, had been duly registered, then, as regards him, the deed of Respondent not registered would have been inoperative; or, if Appellant had shown a legal title to the property, anterior in date to Plaintiff's second deed, that of November, 1855, the deed last mentioned could not have been held binding upon him. But, as neither party has registered, and, as it does not appear that Appellant acquired any legal title to the property before the deed of November, 1855, I am of opinion that Respondent is entitled to the benefit of that deed, and, therefore, that the judgment of the Superior Court is right.

MONDELET, juge: Je pense que le jugement dont est appel est bien fondé: 1° Il n'y a pas eu novation, rien de plus clair. D'ailleurs, il paraît que l'Appelant ne tient pas à ce moyen. 2° Le créancier et le débiteur originaires ont pu légalement changer les termes du paiement; c'est ce qui a été fait par l'acte du 30 novembre 1855. 3° L'Appelant n'ayant pas produit son acte d'acquisition, ne fait apparaître aucun intérêt, ni cause ou raison de se plaindre de l'abrogation du délai accordé par l'obligation du 18 octobre 1852, effectuée par l'acte du 30 novembre 1855. 4° Il y a, d'ailleurs, contradiction dans les prétentions de l'Appelant, qui, pour appuyer son plaidoyer de novation, accepte l'acte du 10 novembre 1855, et le rejette quant à l'abrogation du délai pour le paiement. Cela posé nous n'avons pas à nous occuper de la question d'interruption de prescription, qui serait oiseuse, et, encore moins de savoir si, par l'action actuelle, le Demandeur eût pu faire valoir ce moyen, eût-il été pour lui nécessaire de le faire.

Le jugement de la Cour d'Appel a confirmé purement et simplement celui de la Cour Supérieure. (15 *D. T. B. C.*, p. 40.)

SICOTTE et RAINVILLE, pour l'Appelant.

LEBLANC et CASSIDY, pour l'Intimé.

(1) 37 Con. stat. Lower Canada, sec. 3, sous-sec. 2.

PROCEDURE.—MOTION.—EXCEPTION A LA FORME.

SUPERIOR COURT, Quebec, 5 novembre 1864.

Before TASCHEREAU, Justice.

LESLIE, Plaintiff, *vs.* FRASER, Defendant.

Jugé: 1o. Que le mérite d'un plaidoyer ne peut être jugé sur une motion pour le faire renvoyer. (1)

2o. Qu'une exception à la forme ne sera pas renvoyée sur motion fondée sur ce que le numéro de la cause était incorrectement donné dans l'endossement.

Defendant produced an exception to the form in which it was specially alleged that he had not been served with a true copy of the original writ and declaration, and in which he declared his intention of inscribing *en faux* against the bailiff's return of service. The Plaintiff moved to strike this plea, for the following reasons: 1o. Because no documents were filed with it to explain the allegations thereof. 2o. Because it contained no particulars to enable the Court to judge of its sufficiency, or Plaintiff to answer it. In support of this motion Plaintiff cited the case of *Latour* vs. *Masson*, (2) and also the case of *Halpin* vs. *Ryan* (3).

TASCHEREAU, Justice: The two principal causes assigned in support of this motion are: 1o That the plea does not contain sufficient particulars, and: 2o That the exhibits upon which it is founded were not filed with it. I have already held that a simple motion is not sufficient to attack the merits of a plea, and I am disposed to hold the same thing again, unless the plea is absurd on its face. The second ground of motion, that the exhibits were not filed with the plea, is based upon the 24th rule of practice, this rule does not apply in the present case, and the question cannot arise. There is nothing to prevent the production of the copy of the declaration by Defendant at the proper time, it is a simple question of proof, the foundation of the plea is not the incorrect copy, but the service of that copy. Another objection taken at the argument

(1) V. art. 135 C. P. C.

(2) Une exception à la forme fondée sur le fait que, dans la copie du bref signifiée au Défendeur, l'un des Demandeurs était appelé "Rickard" au lieu de Ricard, sera renvoyée sur motion. (*Latour et ux.* vs. *Masson*, C. S., Montréal, 31 mars 1856, DAY, J., SMITH, J., et MONDELET, J., 5 R.J.R.Q., p.149.)

(3) Il n'y a pas lieu à l'inscription de faux pour surcharge sans importance dans un document. (*Halpin* vs. *Ryan*, C. B. R., Montréal, 12 mars 1855, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., et CARON, J., confirmant le jugement de C.S., Montréal, 29 avril 1854, 4 R. J. R. Q., p. 463.)

was that this plea was filed in the wrong cause, that in fact it was endorsed with a different number from that of the action, but I consider the number has nothing to do with the cause, it is put there only to facilitate the proceedings before the Court. The law requires that every paper filed should be endorsed with the number, names of parties, &c.; but the effect of this is not *à peine de nullité*, the only thing that could have taken place was that the prothonotary might have refused to receive the paper. At the argument Plaintiff cited the case of *Leverson et al.* vs. *Cunningham et al.*, in which it was held: "That an opposition by a Defendant will be dis-" missed on motion, the opposition being headed, "No. 363, " G. B. C. Leverson, Plaintiff, James Cunningham, Defendant," " there being no number on the endorsation, and the words " *et al.* being omitted, both in the heading of the opposition " and in the indorsation." (1) This case was however much stronger than the present one, for, not only was the number absent from the indorsation, but the names of the parties were not complete, either in the body of the opposition itself, or in the indorsation. I must therefore hold that the merits of any pleading cannot be decided on a simple motion to dismiss. (15 *D. T. B. C.*, p. 43.)

ANDREWS and ANDREWS, for Plaintiff.

CASAULT, LANGLOIS and ANGERS, for Defendant.

COMPETENCE.—ABONNEMENT AUX JOURNAUX.

CIRCUIT COURT, Quebec, 21 novembre 1864.

Before TASCHEREAU, Justice.

FOOTE, Plaintiff, *vs.* FREER, Defendant.

Jugé : Que la simple livraison d'un papier-nouvelle au bureau de poste dans le district où il est publié n'est pas suffisante pour donner à la cour juridiction sur un Défendeur résidant dans un autre district, dans une poursuite pour abonnement au journal, à moins qu'il ne soit constaté qu'il avait été ainsi délivré sur l'ordre exprès du Défendeur.

This action was instituted for the recovery of $12.50, being for two years and six months subscription to the *Quebec Morning Chronicle*, a newspaper published in the district of Quebec. The Defendant held the office of Post Master at Montreal, where he resided. To this action, Defendant pleaded by declinatory exception that the action ought not to have

(1) 5 R. J. R. Q., p. 148.

been brought in Quebec, inasmuch as the cause of action did not arise in Quebec, and that the Court therefore had no jurisdiction inasmuch as Defendant had no domicile in Quebec and was not served personally, or otherwise, with the writ and process *ad respondendum* within the district of Quebec. The Plaintiff proved that the paper was transmitted to Defendant regularly through the post office, being mailed each day at Quebec, and that no objection was ever taken to this mode of delivery, except, upon one occasion, when Defendant complained that the paper had been delayed on one or two occasions; at the *enquête*, it appeared that Plaintiff's witnesses had no knowledge of any order having been given by Defendant to Plaintiff to send him the paper.

DUNBAR, for Defendant, in support of declinatory exception: The courts have held, over and over again, that to give jurisdiction the whole cause of action must arise within the district in which the suit is brought, unless the Defendant be there served with process. The Court of Appeals so decided in the case of *Sénécal* vs. *Chenevert*, (1) and, among other cases, in the Superior Court, may be cited *Ricard* vs. *Leduc* (2), *Rousseau* vs. *Hughes (3)* and *Warren* vs. *Kay (4)*. The order is clearly part of the cause of action, for it has been held in the case of *Parson et al.* vs. *Kelly (5)*, that the delivery of a paper, without an order is not sufficient to bind Defendant sued for his subscription to the paper. In the present case, there was not a delivery even at Quebec. The mailing of the paper here could not constitute a delivery in law, unless Defendant had indicated that as the manner in which he wished the paper to be sent to him, but he never gave any directions at all concerning it. It appears from the evidence that it had been forwarded for some time as a free paper by the former proprietor of the *Morning Chronicle*, and that, upon the present Plaintiff's becoming the proprietor, he had continued to transmit his paper to Defendant (having found his name in the list handed over to him) until payment was demanded, when Defendant stopped taking the paper, giving as his reason

(1) 12 R. J. R. Q., p. 248 et 8 R. J. R. Q., p. 235 et 237.

(2) Lorsqu'une vente de marchandises est faite dans un district et la livraison dans un autre, l'acheteur ne peut être poursuivi dans le district où la vente a eu lieu, s'il n'y a pas son domicile ou si l'action ne lui a pas été signifiée là personnellement. Dans ce cas il faut, pour donner juridiction à la cour, que la vente et la livraison ait lieu dans le même district. (*Ricard* vs. *Leduc*, C. C., Montréal, 27 mars 1862, SMITH, J., 10 R. J. R. Q., p. 208).

(3) 12 R. J. R. Q., p. 247 et 6 R. J. R. Q., p. 203.

(4) 12 R. J. R. Q., p. 246 et 5 R. J. R. Q., p. 153.

(5) 7 R. J. R. Q., p. 30.

that he had always considered that it was furnished to him as a gratuity. There was, moreover, nothing to show that Defendant was ever notified that Plaintiff meant to be less liberal than his predecessors with regard to free papers.

AUSTIN, for Plaintiff: *Nemo presumitur donare* is a well known maxim of law. The Defendant, holding the office of post master, at Montreal, supposed that the proprietor of the *Morning Chronicle* sent him daily a copy of that journal for a period of thirty months as a pure gratuity, and, upon presentation of the account, refuses to pay it. Upon the institution of his action, he resists the claim, not only upon the above grounds, but, by a declinatory exception, attacks the jurisdiction of the court, and alleges it incompetent to try the cause, as Defendant was a resident of Montreal during the time above mentioned, and that the contract between the parties did not wholly take place within the jurisdiction of this court. The Defendant no doubt received the newspaper, which was mailed every day in the Quebec post office to his address, and, by so doing, acquiesced in the manner of its delivery. The mailing of the paper, in Quebec, was obviously all that the law contemplated, or common sense enjoined, to perfect the contract between the parties in this district, and to vest the required jurisdiction in this court. If the pretensions of Defendant be upheld, the intention of the legislature purporting to give facilities to creditors to recover their debts, will, in these instances at least, become a dead letter, and newspaper proprietors will have to resort to every country village and hamlet throughout the province to prefer their claims.

TASCHEREAU, Justice: The pretensions of Defendant are well founded, and the action must be dismissed, both upon the merits of the action itself, and upon Defendant's declinatory plea. I do not go the length of the learned judge who decided the case of *Parsons* vs. *Kelly*, that an order for a newspaper is in all cases necessary. Good faith should prompt a person who receives a newspaper, and does not wish to subcribe to it, to return it to the publisher, but here Defendant had reason to suppose that Plaintiff was extending to him the same liberality he had enjoyed from the former proprietor of the *Chronicle*, and if Plaintiff did not wish it to be so, he should have notified Defendant. Had the paper been mailed at Quebec under an express order from Defendant, I would have held that such mailing constituted a delivery. JUDGMENT: Action dismissed with costs. (15 *D. T. B. C.*, p. 46.)

AUSTIN, for Plaintiff.

SECRETAN and DUNBAR, for Defendant.

OPPOSITION A JUGEMENT.

Cour de Circuit, Québec, 25 novembre 1864.

Présent : Taschereau, juge.

Venner, Demandeur, *vs.* Lamontagne, Défendeur, *et* Lamontagne, Opposant.

Jugé : Que le défaut de déposer avec une opposition à jugement, une somme suffisante pour le paiement des frais encourus par le Demandeur à compter du rapport du writ jusqu'à jugement, n'est pas une cause suffisante pour faire rejeter l'opposition. (1)

Dans cette cause, il fut fait motion de la part du Demandeur pour faire renvoyer l'opposition à jugement du Défendeur. 1° Parce que, par la loi, il est déclaré qu'aucune telle opposition ne sera reçue à moins que l'Opposant ne dépose entre les mains du greffier une somme suffisante pour payer les frais encourus par le Demandeur, à compter du rapport du bref jusqu'au jugement. 2° Parce que l'Opposant n'avait pas fait le dépot.

Taschereau, juge : Le Demandeur désire faire rejeter l'opposition à jugement du Défendeur, parce qu'il n'a pas déposé une assez forte somme pour payer les frais encourus par le Demandeur, tel que voulu par la loi. La cause de *Gauthier* vs. *Marchand*, décidée à Montréal par Son Honneur le juge Badgley a été citée lors de l'argument de la part du Demandeur ; (2) dans laquelle cause il a été jugé : " Que, dans " le cas d'opposition à jugement obtenu en vacance, l'Oppo- " sant n'est tenu de déposer entre les mains du greffier ou " protonotaire, sous l'autorité de la 14e clause de l'acte 22 Vict., " ch. 5, et de la 46e clause de l'acte 23 Vict., ch. 57, que les " déboursés faits par le Demandeur depuis le rapport de l'ac- " tion exclusivement jusqu'au jugement inclusivement ; qu'ain- " si le dépôt d'argent ne doit comprendre aucune partie de " l'honoraire de l'avocat." Les frais encourus par le Demandeur sont réglés par les tarifs de la cour, et si ces tarifs accordent à l'avocat du Demandeur un honoraire plus fort après jugement que celui accordé après l'entrée de la cause, je ne puis voir pourquoi l'on refuserait de le lui donner. Je ne puis donc pas concourir dans le jugement de l'honorable juge. Je pense bien que, dans la présente cause, un montant suffisant pour payer les frais du Demandeur n'a pas été déposé avec l'opposition, mais ce n'est pas la faute du Défendeur, mais bien celle du

(1) V. art. 486 C. P. C.

(2) 9 R. J. R. Q, p. 66.

greffier de cette cour. La loi dit : " No such opposition shall be received by the prothonotary or clerk, unless it be accompanied with an affidavit &c., unless the Opposant deposits with the prothonotary or clerk a sum sufficient to pay the costs incurred by the Plaintiff after the return of the writ up to judgment. (1) Je renvoie donc la présente motion, mais avec dépens contre l'Opposant, et à la charge par lui de faire taxer les frais qu'il est obligé de payer au Demandeur suivant la loi, et de les déposer sous trois jours entre les mains du greffier de cette cour. (15 *D. T. B. C.*, p. 49.)

LEGARÉ et MALOUIN, pour le Demandeur.

THÉBERGE et NADEAU, pour l'Opposant.

DOMMAGES RECLAMES PAR LE PERE D'UN MINEUR.

SUPERIOR COURT, Quebec, 4th February, 1865.

Before TASCHEREAU, Justice.

NEILL, Plaintiff, *vs.* TAYLOR, Defendant.

Jugé : 1° Qu'un père peut maintenir une action en dommages en son propre nom pour torts faits à son enfant mineure, sa servante, s'il est en conséquence privé de ses services, et souffre autrement des dommages. (2)

2° Qu'une fille mineure est témoin compétent pour son père pour établir des actes de violence faits à sa personne tandis qu'elle était membre de sa famille. (3)

3° Que quoique le tort commis fût une félonie, le Demandeur pouvait néanmoins procéder en dommages sans avoir au préalable poursuivi criminellement. (4)

This was an action on the case instituted by a father, in his own name, to recover damages from Defendant for for-

(1) Con. stat. Lower Canada, cap. 83, sec. 117.

(2) 2 Dareau, Tr. des Injures, pp. 345, 347.

(3) Cons. Stat. L. C. Cap. 82, sect. 14.

(4) L avait intenté une action en dommages-intérêts contre C et M pour injures et voies de fait. C et M plaidèrent par une défense au fond en droit fondée principalement sur les deux raisons suivantes : Que le Demandeur ne pouvait se pourvoir contre les Défendeurs par une seule et même action et que les allégués de la déclaration, s'ils étaient vrais, établissaient une félonie sur laquelle il fallait d'abord procéder au criminel. La Cour Supérieure (VANFELSON, J, dissident, DAY, J, et une autre juge), maintenant la défense au fond en droit, a jugé que, les faits allégués par la demande constituant une félonie, le Demandeur ne pouvait se pourvoir en dommages avant que cette félonie eût été poursuivie au criminel. Sur appel, la Cour du Banc de la Reine (ROLLAND, J, PANET, J, et AYLWIN, J)., le 17 janvier 1854, a jugé, infirmant le jugement de C. C., que les faits allégués ne constituaient pas une félonie et qu'il n'était pas nécessaire que l'Appelant procédât au criminel avant de pouvoir réclamer des dommages pour les injures corporelles qu'il avait reçues. (*Lamothe* et *Chevalier et al.*, 4 R. J. R. Q, p. 127.)

cibly debauching his minor daughter, while under his roof and protection. The declaration alleged that Plaintiff was respected by his neighbours, but that Defendant, a married man, intending to injure him in his sensibility and to deprive him of the comfort, society and services of his daughter, and servant, entered his dwelling, during the temporary absence of the other members of the family, and there forcibly committed the violence complained of; that, in consequence, his daughter and servant became indisposed, and gave birth to a seven months child; that, during this indisposition, Plaintiff lost her comfort, society aud services, which alone were reasonably worth £50; that her health was still impaired, and that Plaintiff, by means of the premises, had suffered injury in his sensibility and business, had been harrassed and annoyed and sustained damage in all to the extent of £500. Defendant pleaded by a *défense au fond en fait.* Issue having been joined, and the cause inscribed, Plaintiff proceeded to *enquête* and called as a witness the girl who had been assaulted. The Defendant objected to her competency upon the ground that she was the daughter of the Plaintiff, in fact, the real Plaintiff in the cause, and that it was contrary to goods morals to allow the witness to testify to her own misconduct. The court, in deciding the objection, ordered Plaintiff to confine himself to proof only of the acts of violence committed upon the person of the witness. (1)

"The Court, considering that Plaintiff has sufficiently established the tort complained of by his action, and that, by reason thereof, great injury has been caused to him by Defendant, doth adjudge and condemn Defendant to pay to Plaintiff, for his damages, the sum of one hundred dollars, with interest and costs of the present suit, as of the first class of this court. (15 *D. T. B. C.*, p. 102.)

AUSTIN, for Plaintiff.

O'FARRELL, for Defendant.

(1) V. art. 252 C. P. C.

BAIL EMPHYTÉOTIQUE.—DÉCRET.

COUR SUPÉRIEURE, Québec, 5 décembre 1863.

Présent : STUART, Juge.

BLANCHET, Demandeur, *vs.* LE SÉMINAIRE DE QUÉBEC, Défendeur.

Jugé : 1° Que dans le cas de décret d'un immeuble, s'il est indiqué dans les annonces du shérif que l'immeuble est tenu à bail emphytéotique en vertu d'un bail consenti au Défendeur, l'adjudicataire sera tenu d'acquitter la rente ou canon emphytéotique pour l'avenir.

2° Que la rente ou canon emphytéotique est l'indice du domaine direct, dont la propriété réside dans le bailleur, et pour la conservation duquel il n'est pas besoin de produire une opposition à fin de charge.

3° Que du moment qu'il appert que c'est le bail emphytéotique qui est vendu, c'est à celui qui entend se porter adjudicataire de s'enquérir des charges du bail. (1)

4° Qu'il ne peut y avoir de bail emphytéotique sans rente ou canon emphytéotique.

Le Demandeur alléguait que, par bail consenti à l'Islet, le 26 mai, 1856, il avait loué à Caron, pour 69 années, à courir du premier mai alors courant, un terrain situé à l'Islet, à la charge par le preneur de payer une rente annuelle de $25.00 pour chaque année du bail ; que les Défendeurs détenaient actuellement et étaient en possession d'une partie dudit terrain par le Demandeur loué à Caron, à la charge de la rente annuelle de vingt-cinq piastres, au paiement de laquelle le terrain était obligé, et que les Défendeurs s'étaient reconnus débiteurs de la rente et l'avaient payée pendant deux années, et avaient promis lui consentir un titre nouvel, ce qu'ils négligeaient de faire. Pourquoi le Demandeur concluait à ce que les Défendeurs, en leur qualité de détenteurs de partie de l'immeuble par lui loué, fussent tenus de lui passer bon et valable titre nouvel de la rente, et, de plus, à lui payer une somme de $25.00, pour une année de rente due, si mieux n'aimaient les Défendeurs délaisser en justice. Les Défendeurs plaidèrent que, le 16 décembre, 1857, à une vente judiciaire faite par le shérif du district de Québec, dans une cause de *Paré* vs. *Caron*, par le ministère de Forgues, alors leur procureur, ils étaient, moyennant le prix et somme de £136 10, devenus adjudicataires de l'immeuble décrit dans les annonces du shérif comme suit : " Un emplacement ou " morceau de terre situé &c., borné &c., contenant soixante " et sept pieds six pouces de front, sur cent quatre-vingt " pieds de profondeur, &c. Ce lot de terre tenu à bail emphy-

(1) V. art. 640 et 710 C. P. C.

" téotique pour l'espace de 69 années commençant en l'année " 1856, consenti par P. Blanchet à N. Caron &c., sujet à la " mainlevée accordée par le Demandeur de 70 pieds de ter- " rain de front sur toute la profondeur dudit terrain et des " bâtisses qui peuvent s'y trouver en faveur de N. Carleau ;" que les Défendeurs avaient payé au shérif le prix de leur acquisition et adjudication, et avaient obtenu du shérif un titre audit immeuble ; que le Demandeur n'avait dans la dite cause fait aucune opposition pour la conservation de la rente alléguée dans son action, et qu'aucune mention de la rente n'avait été faite dans les annonces publiées dans la *Gazette du Canada*, ni dans la saisie dudit lot de terre, ni dans le décret ou criées faite en vertu de la loi. Que la rente n'était pas de celles qui sont conservées par la loi sans opposition, qu'elle avait été purgée et éteinte par le décret, et que, si les Défendeurs avaient payé aucune partie d'icelle depuis leur acquisition, c'était par erreur, sur les instances, et prières et sollicitations du Demandeur, et sans obligation de leur part.

LARUE, pour le Demandeur : La translation de propriété que fait l'emphytéose, est proportionnée à la nature de ce contrat, où le maître baille le fonds et retient la rente. Et, par cette convention, il se fait comme un partage des droits de propriété entre celui qui baille à rente et l'emphytéote. Car celui qui baille demeure le maître pour jouir de la rente, comme du fruit de son propre fonds, ce qui lui conserve le principal droit de propriété, qui est celui de jouir à titre de maître, avec les autres droits qu'il s'est réservés. Et l'emphytéote de sa part acquiert le droit de transmettre l'héritage à ses successeurs à perpétuité, de le vendre, de l'aliéner, avec les charges des droits du bailleur, &c. Domat., liv. 1, tit. 4, s. 10, § 6, dit : Les droits de propriété que retient le maître, et ceux qui passent à l'emphytéote, sont communément distingués par les mots de *propriété directe*, qu'on donne au droit du maître, et de *propriété utile*, qu'on donne au droit de l'emphytéote. Ce qui signifie que le premier maître du fonds conserve son droit originaire de propriété, à la réserve de ce qu'il transmet à l'emphytéote ; et que l'emphytéote acquiert le droit de jouir et de disposer à la charge des droits réservés au maître du fonds. C'est pourquoi l'on considérait différemment dans le droit romain l'emphytéote, ou comme étant, ou comme n'étant pas le maître du fonds, selon les différentes vues et les divers effets de ces deux sortes de propriété. Guyot, dit que la rente est une redevance annuelle que le bailleur réserve sur son héritage, pour marque de son domaine direct. (1) Ce sont les

(1) Guyot, Rép. de Jur., vbo Emphytéose ; Ancien Denisart, vbo Emphytéose.

Romains qui nous ont transmis l'usage de l'emphytéose. Dans l'origine elle n'attribua chez eux au preneur qu'une puissance à temps. C'est pour cela que les lois romaines n'ont donné le titre de seigneur au droit de l'emphytéose (preneur) que quand l'emphytéose est devenu perpétuelle. L'on voit, par ces autorités, qu'il ne peut y avoir de bail emphytéotique sans une redevance annuelle qui représente le domaine direct. Merlin : "La pension ou redevance emphytéotique est tellement de l'essence de ce contrat que s'il n'y en avait pas une réserve ce ne serait point une emphytéose." (1) Duranton explique que la redevance est payée en reconnaissance du droit de propriété que se réserve le concédant, et que le concédant avait le domaine direct dans la propriété, et l'emphytéote le domaine utile. (2) Au Nouveau Denisart on trouve qu'un des premiers engagements qui résulte de l'emphytéose, est celui de payer le canon emphytéotique, à défaut de quoi le bailleur a toujours le droit de rentrer dans sa propriété. Et, quant à la question de savoir si le propriétaire d'un héritage donné à bail emphytéotique est obligé ou non de former, avant l'expiration de ce bail, une opposition au décret qui s'en poursuit sur le preneur, pour empêcher que ce décret ne purge son droit, le même auteur dit qu'un tel propriétaire ne peut être dépouillé de sa propriété par un décret, c'est ce qui a été jugé par un arrêt du vingt-et-un janvier, rapporté par Auzannet, livre 3, ch. 8. (3)

JUDGMENT : "The Court considering the authentic deed or *bail emphytéotique* mentioned in Plaintiff's declaration, executed in the parish of l'Islet, on the 26th day of May, 1856, before Fournier and his colleague, notaries, whereby Plaintiff granted *à bail emphytéotique*, for the period of 68 years, to be computed from the first day of may then instant, to Nazaire Caron, present and accepting thereof, a certain lot of ground or emplacement in the said deed described, for and in consideration of the rent or sum of six pounds five shillings, payable every six months, commencing on the first day of May then last past. Considering that Defendants have since become, and now are, in *possession, à titre de propriétaires* of part of the said lot of land or emplacement so granted *à bail emphytéotique*. Considering that the *bail emphytéotique* was

(1) Merlin, Rép. de Jur., vbo. Emphytéose.

(2) Duranton, Vol. 4, Nos. 75, 76, 77.

(3) Nouveau Denisart, vbo. Bail à Rente ; Dumoulin, des Censives et Droits Seigneuriaux, titre 2, Nos. 36, 37, 38 ; Hervé, Théorie des Matières Féodales et Censuelles, Vol. 2, pages 330, 332, 333 ; Nouveau Denisart, Vol. 7, pages 542, 538, 639 ; Lacombe, page 262 ; Persil, Régime Hypothécaire, Vol. 1, page 314 et suivantes ; Cout. de Paris, par Ferrière, Art. 355, par. 3 ; Ferrière, Dict. de Droit, Vol. 1, page 826.

duly registered at the registry office for the county of l'Islet, on the 11th day of June, 1856. Considering, further, that the sheriff of the district of Quebec, in and by his sale to Defendant set forth and in part recited in Defendants plea of perpetual peremptory exception in the cause filed, sold to Defendant the unexpired term of an emphyteotic lease, and that the payment of the rent charge (*cánon emphytéotique*) is essential to the existence of such a lease. Considering that Defendants knew of the existence of the rent charge claimed by the present action; the Court doth overrule and dismiss Defendants' plea of perpetual peremptory exception; and, considering that Plaintiff hath well and sufficiently established the material allegations of his declaration, doth maintain the present action, and, thereupon, doth adjudge and declare the immoveable property to be charged, mortgaged and hypothecated, to and in favor of Plaintiff, for the sum of six pounds five shillings, for arrears of the rent accrued etc., to the payment and continuation, *tant qu'elle aura cours*, of the said *rente* for the future, computing from the 1st November, 1861, according to the terms and stipulation in the said *bail emphytéotique* set forth; and, further, the Court doth order that Defendants do, within eight days from the service upon them of the present judgment, make and execute in favor of Plaintiff, in proper form, before notaries, a *Titre Nouvel* or *Reconnaissance*, conformable in every particular to the charges and stipulations of the *bail emphytéotique* herein before mentioned, a copy of which *Titre Nouvel en forme authentique* shall be delivered within the delay aforesaid to Plaintiff, at the cost of Defendants, and, in default of their executing the said *Titre Nouvel*, it is considered and adjudged that the present judgment do serve and avail as such *Titre Nouvel*; and the Court doth condemn Defendants to pay Plaintiff the sum of six pounds five shillings, for arrears accrued as aforesaid; *si mieux n'aiment* Defendants, within the delay aforesaid, *délaisser en justice* the said immoveable property, in order that the same may be sold in due course upon the curator to be named to such *délaissement*; and that, from and out of the proceeds thereof, Plaintiff may be paid his debt in principal, interest and costs." (15 *D. T. B. C.*, p. 104.)

LARUE and LAPOINTE, for the Plaintiff.

CASAULT and LANGLOIS, for the Defendants.

DOMMAGES.—PROMESSE DE MARIAGE.—SEDUCTION.

BANC DE LA REINE, EN APPEL, Montréal, 4 juin 1864.

Présents : DUVAL, Juge-en-Chef, MEREDITH, MONDELET, et BADGLEY, Juges.

POISSANT, Appelant, *et* BARRETTE, Intimée.

Jugé : Que, dans l'espèce, sur action en dommages pour inexécution de promesse de marriage et en déclaration de paternité, il y avait preuve suffisante de la promesse, mais que l'inconduite subséquente de la Demanderesse justifiait le Défendeur dans son refus d'accomplir telle promesse, et que la preuve était suffisante pour prononcer la déclaration de paternité.

Quid du droit d'une fille majeure d'obtenir des dommages-intérêts pour séduction ?

BADGLEY, Justice : This action is instituted by Plaintiff, a female of age and *usant de ses droits*, against Defendant, *un vieux garçon*, as he is described in the evidence, in damages for $8000, *frais de gésine*, child birth expenses $50, and the costs of supporting their female child, at the rate of $130 *per annum*, until the child should reach ten years, and $200 *per annum* subsequently, of which child it is prayed that Defendant be declared the father. The causes of the *demande* are seduction, breach of promise of marriage, paternity of the child, expenses of its birth and maintainance. The declaration contains the allegations used in cases of this description ; the chastity and modesty of Plaintiff and further the distressful condition of herself and mother, and the recent death of their father and husband, the poverty of both, and their necessity to work for their self support, the facilities thereby afforded to Defendant, a wealthy man, to make their intimacy, and, under pretences of marriage and of placing both herself and mother in comfort, to seduce and have connection with Plaintiff, from which was issue the female child in question, born on the 22 September, 1860. She alleges that he refused before the birth of the child, to fulfil his promise of marriage, and, since then, to support the child. Wherefore the usual conclusions in such cases for the damages suffered by her, also for her *gésine* for the expense above mentioned, and that he be declared to be the father of the child. The Defendant has denied the seduction, and has pleaded affirmatively to the action impeaching Plaintiff's allegation of modesty and good conduct, and offering that as his excuse for not fulfilling his promise of marriage. After evidence adduced on both sides, the judgment of the Superior Court was in Plaintiff's favor, for per-

sonal damages, $1000, for *frais de gésine*, $130, paternising Defendant as the father of the child, and adjudging, for the child's support, $60 *per annum*, for the first seven years, and $120 *per annum*, for the next seven, until the child's 14th year. The evidence is in Plaintiff's favor as to Defendant's connection with her. The presumptions of common morality, as a general rule, are in favor of a female morality, against her previous intercourse with any other persons, unless these presumptions are rebuted by sufficiently strong evidence to the contrary. It has been fully proved that she has not been as reserved in conduct as she should have been, nor has she had the most discreet of companions. These circumstances, doubtless, caused her own personal conduct to be talked about, but no actual immorality has been proved up to the time of her connection with Defendant. That he had his own will of her is established in evidence, which has also proved his imperfect intention to make her his wife, and his subsequent refusal to marry her; of that intercourse, there is no doubt that the child was the issue. If she did wrong after he had wronged her, and she allowed any other person to take liberties with her after Defendant had cast her off, he could not reproach her with that. After his connection with her, to screen himself from damages for his baseness, he imputes loose conduct to her, and then produces his hearers as witnesses against her. His admissions and the evidence of record establish these facts and circumstances of the case against him. In a case of deliberate seduction, money can be no compensation to the unfortunate sufferer for the gratification of mere lust and temporary appetite obtained by the seducer, and heavy damages, in such cases, are rarely, and very properly, not interfered with. But this case presents different circumstances. A young woman of full age, who appears to be well nigh entirely independant of her mother's control, keeping company with a separated wife, a woman doubtfully spoken of, away from her mother's house, at late hours at night, frequently visiting this city, with her friend, for prolonged periods of time, and making acquaintances in Montreal, whilst it is not only proved in evidence, but asserted by herself, that neither she nor her mother were removed from indigence, and that she was obliged to labour herself for her own support; it is therefore not surprising, under such circumstances, that something of this kind should have happened. But her declaration contains the following peculiar allegations: " Que, vers le mois de septembre 1859, usant de l'ascendant qu'il avait acquis sur la Demanderesse, et de l'affection qu'il lui avait inspirée, il se servit de prétextes infâmes pour mettre à exécution ses desseins libidineux, lui disant qu'il ne

la croyait pas vierge, et que, s'il n'était pas convaincu qu'elle le fût, il ne l'épouserait pas : ajoutant que, si elle lui permettait de se convaincre de sa virginité, en se livrant à lui, il l'épouserait, si véritablement elle l'avait conservée, et qu'au contraire, c'est-à-dire, au cas où elle refuserait de céder à son désir, il attribuerait son refus à la crainte qu'elle éprouvait qu'il ne découvrît qu'elle avait eu des relations criminelles avec d'autres hommes." She proceeds to allege that she did not yield at once, but her determination was shaken, *en fut ébranlée*, and, fearing to lose him, " elle se laissa convaincre et n'opposa plus de résistance à ses désirs, et, après avoir eu commerce charnel avec elle, il répéta sa promesse de l'épouser, et que ce commerce dura à des intervalles éloignés jusqu'au mois de décembre de l'année 1859, époque où elle devint enceinte." In this statement made by herself, the consequence was exactly what must have been anticipated. No modest woman would have listened for a moment to such proposal, nor would have allowed it to enter into her consideration and to be thought over for an instant, and, certainly, no modest woman as such could in cold deliberation have made such a compact as this. It was a conditional agreement freely and deliberately made by herself, that, if she were found by him to be a virgin, the price of her virginity should be paid by their marriage. But the condition was that he was to be satisfied. Did she consider that, if she was not, how the fact was to be resolved ? It was left to him, and with a man capable of making such a proposition, she who allowed and accepted the proposal, must have known that, after using her willingness, he would not be satisfied, and so it happened. Her voluntary connection with him lasted from September, when she agreed and gave herself up to him, until December when she became *enceinte*, and he then only declared that he was not satisfied. She did not make her mother a *confidante* of her connection and contract, but acted upon her own independence, as being of full age. Now, this was simply on her part a matter of speculation, and Courts of justice cannot sustain agreements and stipulations founded upon such immoral consideration made by a woman, as a condition precedent for such contracts. She claims damages, for her seduction and for his breach of promise of marriage, the first ground must be weighed by the stipulation of her agreement, and having made her agreement as a matter of speculation there is manifestly no seduction. Then, as to his breach of promise of mariage, her own conduct has been so improper since her connection with him, that she cannot expect that he would marry her. It is true that her impropriety of conduct has occurred only since he cast her off, but the *demande* must be considered at the time

when the action was instituted, and she could scarcely have anticipated their legal union at that time. Her own misconduct has deprived her of damages in this respect also. But he must bear the expenses she has suffered from his connection with her, and must enable her to support their child. The judgment provides for both of these things. It is to be regretted, in the interest of morality and of society, that this *vieux garçon* could not be mulcted more severely than he will be by the judgment rendered, because he has not only wronged the girl, but, after having abused her, he has had the baseness to hold her up to public scorn as an abandoned person. It may control his propensities for the future, and teach him the truth of the old proverb *que le jeu ne vaut pas la chandelle*, sometimes.

MONDELET, juge, *dissentiente:* J'ai eu, dès le principe, des doutes bien sérieux sur la question de savoir si le jugement dont est appel, devrait être confirmé, et ce, pour plusieurs raisons, viz. 1° La règle générale est de ne pas accorder de dommages à une fille majeure. Si, par exception bien rare, on s'est départi de cette règle, ça été à raison de circonstances favorables, ce qui n'est pas le cas ici, vu la mauvaise réputation de l'Intimée, et sa légèreté en nombre d'occasions. 2° Il n'est pas suffisamment prouvé, que l'Appelant soit le père de l'enfant. Il ne faut pas perdre de vue, que les parents, bien qu'aux yeux de la loi, ils soient admissibles comme témoins, n'en sont pas moins les *parents*, et que leur témoignage est laissé, comme de raison, à l'appréciation de la cour. Je n'ai guère confiance dans le témoignage du frère de l'Intimée. Et quant à celui de sa mère, il me paraît étrange, quand je le mets en regard de ceux des témoins de l'Appelant, *étrangers*, qui constatent le peu de surveillance qu'a exercée cette mère sur sa fille qu'elle laissait seule à la maison. 3° Le Défendeur, sur serment, nie avoir jamais connu *charnellement* l'Intimée, ce qui contredit directement l'assertion contraire du frère de l'Intimée, et me laisse dans un doute assez grave. 4° S'il est vrai, comme le prétend l'Intimée, que, sous le prétexte de s'assurer si elle était vierge, l'Appelant l'a induite à se livrer à lui, pourquoi a-t-elle continué de le faire? Il promettait de m'épouser, dit-elle! Avons-nous une preuve juridique de cela? 5° Confirmât-on le jugement, ça ne pourrait être quant à ce qui est accordé, si l'on en croit le témoignage désintéressé d'étrangers qui me paraissent en parler avec connaissance de cause. L'on dit que, d'après la preuve et les aveux mêmes du Défendeur, qu'il est certain que le Défendeur a pris avec la Demanderesse de ces libertés qui doivent le faire réputer avoir eu avec elle un commerce criminel, il doit être déclaré le père de l'enfant et condamné, non pas à des dommages, mais aux fins de paternité.

Cependant, je doute qu'il en soit nécessairement ainsi. Il est impossible que le Défendeur fût assez dépravé pour prendre les libertés qu'il admet avoir prises, sans que pour cela, l'on puisse juridiquement conclure et affirmer qu'il a eu ou dû avoir avec elle, un commerce charnel. L'on ne peut juridiquement diviser les admissions du Défendeur, et, sans ces admissions, il me paraît qu'il n'y a pas de preuve qui puisse justifier la déclaration de paternité, à l'encontre du Défendeur. J'avoue qu'il y a du doute, mais je ne dois pas, dans cette cause plus que dans aucune autre, faire peser ce doute contre celui qui est accusé ; en principe, on doit faire le contraire ; en pratique, si on agit autrement, on commet une injustice, puisqu'on condamne sans preuve claire et suffisante. Je suis donc d'avis, que le jugement dont est appel, doit être infirmé, et l'action de la Demanderesse, Intimée, déboutée.

DUVAL, juge en chef : Si l'Intimée perd sa cause, elle le doit à sa mauvaise conduite. Elle ne peut avoir plus de droit qu'elle n'en eût eu, étant l'épouse légitime du Défendeur. Or, si elle eût été la femme du Défendeur, il aurait eu droit, vu la mauvaise conduite de l'Intimée, d'obtenir une séparation de corps et de biens d'avec elle. Il a donc le droit de lui dire aujourd'hui, " Tu ne seras pas ma femme." En effet, on la voit faire société avec une femme de mauvaise réputation, se promener sur les grands chemins, à des heures indues, avec des jeunes gens, venir à Montréal avec cette même femme, y séjourner avec elle, entretenir ensuite des correspondances secrètes. On voit, par le témoignage d'Hamilton, qu'il n'a manqué à ce dernier qu'une occasion favorable pour obtenir d'elle la dernière faveur, après les familiarités qu'elle lui avait déjà permises. Le Défendeur, de son côté, s'est parjuré quand il a déclaré qu'il n'avait jamais eu de commerce charnel avec l'Intimée. Le jugement que la cour va prononcer le déclare le père de l'enfant, et le condamne à l'élever. Ici, il ne s'agit plus de la mère seulement, mais de l'entretien de l'enfant. En France, l'orsqu'une fille, après avoir été séduite, s'est mal comportée avec d'autres et est devenue mère, les cours ont, dans l'intérêt de l'enfant, condamné solidairement tous ceux qui ont eu commerce avec elle. Ce n'est pas une réponse que d'autres ont eu la même faveur. Le Défendeur lui-même dit : " Un tel m'a dit telle et telle chose, et il ne pouvait pas le savoir sans qu'elle lui eût permis des libertés." L'argument retourne contre lui-même. L'Intimée est la victime du Défendeur, cela ne fait pas l'objet d'un doute, et, quoique majeure, elle eût obtenu de cette cour la confirmation de cette partie du jugement de la cour de première instance qui lui accordait £250 de dommages-intérêts, si ce n'eût été sa mauvaise conduite.

" La cour, considérant que les faits constatés par la preuve,

justifient l'appelant, de n'avoir pas accompli la promesse par lui faite d'épouser l'Intimée, et qu'en conséquence, dans le jugement de la Cour Supérieure qui condamne l'Appelant à payer à l'Intimée la somme de £250 de dommages-intérêts, pour inexécution de promesse de mariage, il y a erreur, infirme cette partie du jugement prononcé par ladite cour, à Montréal, le 27 mars 1862, qui condamne l'Appelant à payer à l'Intimée ladite somme de £250 de dommages-intérêts, et déboute l'Intimée de cette partie de sa demande, par laquelle elle réclame des dommages-intérêts pour inexécution de promesse de mariage. Et, quant à la partie du jugement de la Cour Supérieure qui condamne l'Appelant à payer à l'Intimée la somme de £32 10, pour frais de gésine et dépenses encourues par l'Intimée, à l'occasion de la naissance de l'enfant du sexe féminin qui est issu du commerce de l'Appelant avec l'Intimée, et pour l'entretien de l'enfant depuis sa naissance au jour du prononcé du jugement de ladite Cour Supérieure, savoir : au 27 mars 1862 ; et à cette autre partie du jugement qui condamne l'Appelant à pourvoir aux besoins, à l'entretien et à l'éducation de l'enfant, et à payer à l'Intimé, pour cet objet, la somme de £1 5 par mois, jusqu'à ce qu'il ait atteint l'âge de 7 ans, lequel paiement à être fait d'avance, chaque mois, à compter du 27 mars 1862 ; et celle de £2 10 par mois, aussi payable d'avance et mensuellement, après que l'enfant aura atteint l'âge de 7 ans, et jusqu'à ce qu'il ait atteint celui de 14 ans, et réservant à l'Intimée tout recours au cas où l'enfant dépasserait l'âge de 14 ans. Cette cour confirme ledit jugement quant auxdites parties d'icelui. Sur la question des frais et dépens encourus, tant dans la Cour Supérieure que dans cette Cour, confirme la partie dudit jugement qui condamne l'Appelant à payer à l'Intimée les frais encourus en la Cour Supérieure. Et, sur la question des frais et dépens encourus devant cette cour, il est ordonné que chaque partie paie les frais et dépens par elle encourus. L'Honorable M. le Juge MONDELET *dissentiente.* (1) (15 *D. T. B. C.*, p. 51.)

DORION, DORION et SÉNÉCAL, pour l'Appelant.

LORANGER et FRÈRES, pour l'Intimée.

(1) Autorités citées par l'Intimée : 1o Sur la déclaration de paternité, Fournel, Séduction, 135, 137, 138 ; Merlin, Rép., vbo. Fornication ; 8 Poulain DuParc, p 110, no. 22 2o Preuve par déclaration de la mère : Merlin, *loco citato* ; Fournel, 136 ; 8 Poulain DuParc, *loco cit.* 3o Sur la quotité des aliments, 1 Dalloz, Dict de Jur., pp. 101, 332 ; 1 Bourjon, p. 26, *art.* 38, Fournel, 199 ; 5 Journal des Aud., p. 43; 4o Fille majeure a-t-elle droit à des dommages ? Fournel, 8, 9, 26, 28 ; 1 Ferrière, Dict., 859 ; Denisart, Collection de Jur., vbo. Grossesse ; Merlin, Rép., vbo. Fornication, p. 279 ; 1 Servan, 384 ; 3 Brillon, 450, 392 ; 5 Do. 677 ; 1 Arrêts de Perrier, p. 51 ; 2 Journal des Aud., 309 ; 4 Do. p. 330 ; 6 Do. 2e partie, ch. 14 ; Denevers, Journal de Cass., p. 491 ; Journal du Palais, 2e semestre de l'an X, p. 494 ; 5 Merlin, Rép., vbo Fornication ; Denisart, p. 586. 5o Quotité des dommages, 6 Toullier, pp. 236, 302, 314, 323 ; Fournel, 175, 178 ; 8 Poulain DuParc, 105.

SAISIE.—REVENDICATION.—ENQUETE.

BANC DE LA REINE, EN APPEL, Québec, 16 juin 1864.

Présents : DUVAL, Juge-en-Chef, MEREDITH, MONDELET, DRUMMOND et BADGLEY, Juges.

JACKSON, Appelant, *et* FILTEAU, Intimé.

Jugé : 1o Que, dans une action en revendication, il n'est pas nécessaire de conclure à ce que la saisie-revendication soit déclarée bonne et valable, et que les effets saisis seront remis au Demandeur, en autant qu'il est ordonné au Défendeur par le writ de montrer cause pourquoi la saisie-revendication ne serait pas déclarée bonne et valable, ce qui équivaut à une demande que les effets seront remis au Demandeur, et le writ et la déclaration ne devant être considérés que comme un. (1)

2o Qu'il ne sera pas permis à une partie d'examiner un témoin une seconde fois, sans au préalable avoir obtenu la permission de la Cour. (2)

Le premier mai, 1862. le Demandeur Intimé fit saisir revendiquer deux cent trente-neuf genoux ou courbes d'épinette rouge en la possession de l'Appelant. Le Demandeur, par son action, concluait à ce qu'il fût déclaré le seul et véritable propriétaire desdits deux cent trente-neuf genoux d'épinette rouge, et à ce que le Défendeur fût condamné à lui payer la somme de huit cents piastres de dommages, et les dépens. A cette action, le Défendeur plaida d'abord par une exception péremptoire à la forme, demandant le renvoi de l'action: 1. Parce qu'il n'était pas allégué que l'Appelant fût en possession des genoux ou courbes lors de l'émanation du bref de saisie-revendication. 2. Parce que l'Intimée ne demandait pas, par les conclusions de son action, que la saisie-revendication fut déclarée bonne et valable. 3. Parce que l'Intimé ne demandait pas non plus que les genoux ou courbes fussent remis en sa possession. Le Défendeur plaida, en outre, par une défense au fond en droit et par une défense au fond en fait, et ensuite par une exception péremptoire en droit perpétuelle. Les raisons à l'appui de l'exception péremptoire à la forme et de la défense au fond en droit étaient à peu près les mêmes. Dans le cours de l'enquête, le Demandeur, ayant fait entendre le nommé Houde, l'un de ses témoins, une seconde fois, sans au préalable avoir obtenu permission de ce faire, le Défendeur fit motion pour faire rejeter du record ce second témoignage de Houde. Les parties ayant de part et d'autre produit leurs témoignages et été entendues, tant sur l'excep-

(1) V. art. 50 et 867 C. P. C.

(2) V. art. 272 C. P. C.

tion à la forme que sur le mérite de la cause, la Cour Supérieure, le 14 octobre, 1863, rendit le jugement suivant : "La Cour, considérant que le Demandeur allègue spécialement que, lors de l'affidavit par lui fait, pour émaner le bref de saisie-revendication en question en cette cause, et avant l'émanation dudit bref de saisie-revendication, le Demandeur était en possession du bois saisi et revendiqué et qu'il est suffisamment allégué par le Demandeur que le Défendeur s'était illégalement emparé dudit bois pour justifier l'émanation du bref et sa demande, et que, si le Défendeur se fût réellement désisté de la possession du bois avant l'émanation du bref, il était de son devoir de plaider ce fait par exception spéciale : Considérant que la déclaration du Demandeur et le bref de saisie-revendication doivent être considérés comme ne formant qu'un, et que par le bref il est ordonné que le Défendeur soit tenu de montrer cause pourquoi la saisie-revendication ne serait pas déclarée bonne et valable : Considérant que la demande du Demandeur est à toutes fins que de droit valable, sans qu'il fût nécessaire pour le Demandeur de conclure, par sa déclaration, à ce que ledit bois lui fût remis, et qu'en réalité la demande d'être déclaré propriétaire du bois, accompagnée de l'ordre énoncé en le bref de revendication adressé au Défendeur, lui commandant de montrer cause pourquoi la saisie-revendication ne serait pas déclarée bonne et valable, équivaut à une demande que le bois lui soit remis, et qu'en autant cette cour est justifiable à ordonner que le bois soit rendu au Demandeur : Considérant que, dans le cas de saisie-revendication, où l'objet revendiqué est mis sous main de Justice, il n'est pas obligatoire pour le Demandeur de laisser au Défendeur l'alternative de payer la valeur de l'objet. La Cour renvoie avec dépens l'exception péremptoire à la forme du Défendeur, ainsi que sa défense au fond en droit, avec dépens : Et considérant que le Demandeur ne pouvait, sans un ordre de cette Cour, faire entendre une seconde fois le nommé Houde, accorde la motion du Défendeur demandant le rejet du second témoignage de Houde, avec dépens contre le Demandeur, et rejette le dit témoignage." C'est de ce jugement qu'un appel avait été institué.

AUSTIN, for Appellant : It is submitted that the ground of *exception à la forme*, stating that he was not bound to answer the demand, because the conclusions of the declaration were altogether insufficient, containing no prayer or demand that the timber in question should be restored or delivered up to Respondent, the gist of the action of revendication, alone is fatal to not, Respondent's case, as, in the absence of such prayer or demand in the conclusions of his declaration, the Court below could not, nor can this Court, supply the omission, notwithstan-

ding that what is necessary may, in substance, appear in the body of the declaration, or otherwise seem to be just. The introduction, therefore, in the judgment referred to, of the words " considérant que la demande du Demandeur est, à toutes fins que de droit, valable, sans qu'il fût nécessaire pour le Demandeur de conclure, par sa déclaration, à ce que le bois lui fut remis, et qu'en réalité la demande d'être déclaré propriétaire du bois, accompagnée de l'ordre énoncé en le bref de revendication adressé au Défendeur, lui commandant de montrer cause pourquoi la saisie-revendication ne serait pas déclarée bonne et valable, équivaut à une demande que le bois soit remis, et qu'en autant cette cour est justifiable à ordonner que le bois soit rendu au Demandeur." And of the words " ordonne que les deux cents trente-neuf genoux ou courbes d'épinette rouge soient remis au Demandeur," constitute an adjudication upon, and the awarding of rights beyond those sought or asked for in the conclusions of Respondent's *demande*, and the judgment in question is consequently null. The Appellant also submits, that, as Respondent did not afford him the alternative of restoring the timber or paying the value thereof, his conclusions on this ground are also defective and cannot be sustained.

CARON, pour l'Intimé : La première objection soulevée par l'exception péremptoire à la forme ne peut pas être sérieuse, vu qu'il est allégué spécialement dans la déclaration de l'Intimé qu'il " était possesseur paisible du bois qu'il revendique, lorsque l'Appelant s'en empara illégalement et contre la volonté et malgré les défenses réitérées de l'Intimé." Quant à la seconde objection contenue dans cette exception péremptoire à la forme, contre les conclusions de la déclaration de l'Intimé, elle n'est d'aucun poids, parce que la déclaration et le bref de saisie-revendication doivent être considérés comme ne formant qu'une pièce, et que, par le bref il est ordonné que l'Appelant sera tenu de montrer cause pourquoi la saisie-revendication ne serait pas déclarée bonne et valable. Au reste, c'est la doctrine qui a toujours été maintenue par cette cour. La troisième objection ne peut pas être invoquée non plus, parce que la demande de l'Intimé était, à toutes fins que de droit, valable, sans qu'il fût nécessaire pour lui de conclure à ce que le bois lui fût remis ; car la demande d'être déclaré propriétaire du bois saisi, accompagnée de l'ordre contenu dans le bref adressé à l'Appelant, lui commandant de montrer cause pourquoi la saisie-revendication ne serait pas déclarée bonne et valable, équivaut à une demande que le bois lui soit remis. Jugement confirmé. (15 *D. T. B. C.*, p. 60.)

AUSTIN, pour l'Appelant.

CARON, pour l'Intimé.

TAXE DE L'EAU.—CITÉ DE QUÉBEC.

QUEEN'S BANCH, APPEAL SIDE, Quebec, 16th September, 1864.

Before DUVAL, Chief Justice, MEREDITH, MONDELET, DRUMMOND and BADGLEY, Justices.

SHAW *et al.*, Appellants, *and* THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF QUEBEC, Respondents.

Jugé : Qu'une bâtisse dans la cité de Québec, dans la partie inférieure de laquelle il y avait des magasins, dans lesquels il était vendu des effets, tant en gros qu'en détail, et dont les étages supérieurs étaient occupés comme bureaux, n'est pas sujette à une taxe pour l'eau de deux chelins dans le louis, sur sa valeur annuelle cotisée comme maison occupée et ne peut être cotisée que comme magasin et autres bâtisses semblables, au montant d'un chelin dans le louis, et pas plus.

MEREDITH, Justice : The Appellants were, during the year 1863, proprietors of a building, in the city of Quebec, which, according to the admission of the parties, was used as follows : " in the lower part, there were stores, in which goods were " sold, as well by wholesale as retail, in the upper part, there " were offices." According to the judgment of the recorder, the building, as so used, has been held subject to a water rate of two shillings in the pound, on its assessed annual value. The Appellants complain of that judgment, on the ground that they ought to have been held liable for a water rate of one shilling in the pound, only. By the 2nd sec. of the 18 Vict., chap. 30, Respondents are authorized to specify and declare, by a by-law, that the proprietors or occupiers of " houses, stores and similar buildings " in the city, shall be subject to an annual rate, or assessment ; which shall not exceed two shillings in the pound on the assessed annual value of " occupied houses," and one half the amount on *stores and similar buildings*. And, by the 22d Vict., cap. 63, sec. 13, it is provided that the word " store " *(magasin)* in the acts respecting the water-works of the city of Quebec shall be interpreted as meaning " buildings used for the storing and selling of goods by whole- " sale." The pretension of Respondents, as I understand it, is that the building in question is, not a " store," *(magasin)*, within the meaning of the 22d Vict., but is, at least in one sense of the word " house " " an occupied house," and that, therefore, it is subject to the assessment of two shillings in the pound. But this pretension is subject to the grave objection that it deprives the words of the statute " and similar buildings " of all effect. The learned counsel for Respondent has felt embarrassed by the words to which I have just ad-

verted; and, in order to relieve the case from the difficulty, has submitted the following argument: " Quant aux mots et *autres bâtisses semblables* dont se sert le législateur, ils doivent se rapporter au mot magasin, autrement ils ne signifieraient rien. En effet, qu'est-ce qu'une bâtisse semblable à un magasin? rien autre chose qu'une bâtisse qui, n'étant pas de sa nature un magasin (store), (par exemple une maison d'habitation convertie en magasin) est employée comme magasin suivant la signification de ce mot donnée par l'acte 22 Vict., (1859) ch. 63, ci-dessus cité." But it is plain that a " maison d'habitation *convertie en magasin*, and used for the storing and selling of " goods by wholesale," would, when so changed and used, be, even in the strictest sense of the words, "a store" *(magasin)*, within the meaning of the 22d Vict.; and, therefore, the interpretation, contended for by Respondents, in effect, causes the legislature to say, that the lower rate of assessment shall be payable upon stores (magasins) *and no other buildings*, whereas what the legistature has said is, that the lower assessment shall be payable upon stores and " *similar buildings.*" Moreover, under the interpretation contended for by Respondents, wholesale stores would be subject to a water rate of s. only in the £; whilst retail stores would be subject to a water rate of 2s. Now, the protection against fire, resulting from an abundant supply of water, was one of the grounds upon which the establishment of our water works, and the consequent levying of water rates, was allowed by the legislature; and, as the property protected in wholesale establishments is often, if not generally speaking, of greater value than the property in retail establishments, I cannot see why the water rate on a building of the assessed annual value of £100 should be £5, if occupied as a wholesale store, and £10 if occupied as a retail store. I shall now in a very few words give my own view of the statute. The word "house" in english, and " maison" in french, is frequently, if not most commonly, used as equivalent to " dwelling house;" I think it is in this sense that it has been used by the legislature in the statute under consideration. This reasonably may be inferred from the word " *house*" *maison*, being used in the provision in question, not as including " stores and similar buildings," but in contradistinction to " store and similar buildings." With comparatively few exceptions the buildings in a city intended for the use of man, may be divided into those used as dwelling houses, and those used for the purposes of business. This, it seems to me, is the division which the legislature had in view in the provisions under consideration. All dwelling houses, used as such, come under the head of " occupied houses," and all buildings used for the purposes of busi-

ness, come under the head of "stores and similar buildings." If the law be thus understood, the reason for subjecting "occupied houses" to a much higher water rate than "stores and similar buildings," is obvious, it being certain that, generally speaking, the supply of water required for dwelling houses (where water is used for cooking, washing and other domestic purposes) is greater than the supply necessary for houses used for the purposes of business. There are, it is true, some business establishments which require a much larger supply of water than any dwelling house; but such establishments ought to be subjected to a special rate, and it would obviously be unjust to subject all buildings occupied for the purposes of trade and business, to a heavy water rate, in consequence of a comparatively trifling number of establishments requiring an unsually large supply. It is true that, if the statute ought to be interpreted as I think it ought; it could, without difficulty, have been more cleary worded; but that objection is of no weight, because it could be urged, with equal force, against *any* interpretation of the provision in question. As to the provision contained in the 22d Victoria above adverted to, and to which our attention was drawn at the argument, I do not think it can affect the present case; because, although it defines the word "*store,*" it does not assist us in giving a meaning to the words "*similar buildings*;" and it is there the difficulty lies. Upon the whole, it seems to me that, even according to the rules of interpretation applicable to statutes generally, the building of Defendant, in the lower part of which "goods were sold, as well by wholesale as retail, and in "the upper part of which there were offices" may, as regards water rates, be considered similar to buildings used for the storing and selling of goods by wholesale; and, therefore, that it ought to be held subject to the lower of the two water rates, and, even if the case admitted of doubt, Appellants ought to have the benefit of such doubt, the rule being that statutes imposing taxes or other burdens upon the subject are to be strictly construed.

The court seeing the admission, to the effect that the building belonging to Appellants, on account of which the arrears of water rates claimed by Respondents are alleged to be payable, was used as follows: "in the lower part, there were stores in which goods were sold, as well by wholesale as retail, and, in the upper part, there were offices." Considering that the said building so used cannot be considered an "occupied house," within the meaning of the provincial statute under which Respondents are empowered to levy a water rate or tax, within the limits of the city of Quebec. And, therefore, in the judgment of the court below, condemning Appellants, as the

proprietors of the said building, to pay a water rate, or tax, on account of the said building as if it were an "occupied house" within the meaning of the said statutes, there is error; doth, in consequence, reverse the judgment rendered, by the recorder, on the 11th day of April, 1854. And, proceeding to render the judgment which the said recorder ought to have rendered in the premises: Considering that the arrears of the said water rate, due by Appellants, on account of the said building, to Respondents, for the period mentioned in their account amounted to the sum of $48.50, and to no greater sum. Seeing it is admitted that the said sum was tendered, &c. (15 *D. T. B. C.*, p. 65.)

VANNOVOUS, for Appellants.

BAILLARGÉ, for Respondents.

RESPONSABILITÉ.—REMORQUAGE.

QUEEN'S BENCH, APPEAL SIDE, Quebec 1st December, 1864.

Before DUVAL, Chief-Justice, AYLWIN, MEREDITH, MONDELET and DRUMMOND, Justices.

THE ST. LAWRENCE TOW BOAT COMPANY, Appellants, *and* JOLY, Respondent.

Jugé: Que le propriétaire d'un vapeur remorquant des radeaux est responsable pour l'amarrage, pendant le trajet des radeaux remorqués, appartenant à des tiers, envers le propriétaire du quai où tels radeaux ont été ainsi amarrés.

The action below was for the mooring of certain steamboats belonging to Appellants, and also for the mooring of rafts belonging to third parties amounting to one hundred and twenty dollars. The Respondent alleged that Appellants towed the rafts in question for a stated price, which covered the whole trip, and that they were bound to pay the expenses incidental to navigation, and that, if they paid money for mooring, &c., necessary for the preservation of such rafts, they had a lien for the repayment. That Respondent did not know, and had no means of knowing to whom the rafts belonged, and that it was very easy for Appellants to charge the owners of the rafts with the mooring before they allowed them to go out of their possession, while it would be perfectly impossible for Respondent to follow each raft down to its final destination with a view to getting paid. That these rafts were brought to the wharf and moored there by

the steamers, and, consequently, Appellants were liable for their mooring. That it was for the advantage of the steamers that the rafts were so moored, as, if towed against the tide, or in high winds, they must either have anchored or kept steam up without making headway. The Appellants offered a confession for the mooring of the steamers, but denied all liability for that of the rafts, and expressly denied all the matters of fact alleged in the declaration. The Appellants were condemned to pay Respondent, and from that judgment they appealed.

ALLEYN, for Appellants : It is in evidence that, by the agreements between Appellants and the owners of rafts towed by them, all expenses were to be paid by the owners ; that, whenever the rafts moored to Respondent's wharf, it was at the special request of the persons in charge of the rafts, which always had crews on board ; that the steamers, after shoving the rafts near the wharf, anchored themselves at a distance from the wharf, having no connection whatever with the rafts, which had previously cast off the ropes which had attached them to the steamers. From the form of the action, Respondent evidently relies, not on a contract, but on a supposed quasi obligation, arising out of the presumed benefit derived by Appellants by the rafts being moored while the tide was rising, and so saving them additional expense, and from a natural obligation from the asserted impossibility of finding out the owners of the rafts. But, it seems clear that the contract was between the owners and Respondent, and that no such natural obligation could found an action.

JOLY, pour l'Intimé : Les Appelants ont fait reposer leur défense sur le fait que les radeaux ou trains de bois qu'ils remorquaient n'étaient pas leur propriété, et que, partant, ils ne pouvaient être responsables envers l'Intimé ; que l'on avait présumé une quasi-obligation de la part des Appelants résultant de l'avantage qu'ils retiraient de ce que les radeaux ou trains de bois étaient amarrés au quai, &c. En effet, les vapeurs de l'Appelante amènent les radeaux au quai pour les empêcher d'égrainer, et ces vapeurs en retirent un avantage direct ; mais, même dans le cas où il n'en serait pas ainsi, et où tout l'avantage ne serait que pour les radeaux, l'Appelante a le droit de refuser de délivrer ces radeaux, jusqu'à ce qu'elle ait été remboursée du montant qu'elle a dépensé pour les mettre en sûreté. (1) Mais le fait que " dans tous les cas, l'Appelante

(1) Pardessus, Droit Commercial, No 546, où il est dit que le voiturier, auquel l'Appelante peut être assimilée, a une action pour être payé des dépenses par lui faites pour la conservation de la chose ; il a, en conséquence, un privilège qui subsiste tant que la chose est entre ses mains. L'Intimé considère que l'existence de ce privilège est admise par tous les auteurs.

" retire un grand avantage, chaque fois qu'elle amène des radeaux au quai de l'Intimé," doit suffire pour établir la justice du jugement rendu en faveur de l'Intimé, dont est appel. *Qui commodum sentit debet sentire onus.* C'est un de ces quasi-contrats décrits par Pothier, *Traité des Obligations*, No. 114 : " Dans les quasi-contrats, il n'intervient aucun consentement, et c'est la loi seule ou l'équité naturelle qui produit " l'obligation, en rendant obligatoire le fait d'où elle résulte. " C'est pour cela que ces faits sont appelés quasi-contrats ; " parce que sans être des contrats, ni encore moins des délits, " ils produisent des obligations comme en produisent les contrats.

DRUMMOND, Justice : The Respondent, Gaspard-Pierre-Gustave Joly, Plaintiff in the Court below, is proprietor of a wharf, on the River St. Lawrence, at Platon-Point, about half way between Quebec and Three-Rivers. Joly holds this wharf under Letters Patent from the Provincial Government, and, as to the charges claimable by him, for the use thereof, they were determined by a tarif approved by the Governor in Council, and published in the *Canada Gazette*, according to the requirements of his Patent. The Appellants " The St. Lawrence Tow Boat Company," were incorporated, by the act 26 Vic., chap. 59, for the purpose of towing rafts ; and possess a number of steamers used by them in that service. The Respondent sued Appellants for wharfages due for the use of the said " Platon-Point Wharf " by certain steamboats belonging to Appellants, and by certain cribs and rafts brought, in tow, to the wharf in question by those steamboats, during the season of navigation of 1863. The sum demanded by this action was $187, but Respondent having ascertained that some of the steamboats, against which charges had been made in his account, did not belong to the St. Lawrence Company, filed a retraxit, reducing his demand to $130.50. The Appellants confessed judgment for the sum of ten dollars and fifty cents, amount of wharfage on the steamboats belonging to them, which had been moored at Respondent's wharf ; but refused payment of wharfage upon the rafts, denying all liability for them. It is proved that Appellants contract with owners of rafts to convey them from the *embouchure* of the Ottawa, or, as it is there more generally called, *La Rivière des Prairies*, as the eastern extremity of the island of Montreal ; or from some other point, on the St. Lawrence, to Quebec, for a fixed price ; without regard to the time or expense incurred by the company. Under a contract of this kind, although the foreman of the raft taken in tow is master, for the purpose of providing for the wants of his men, and maintaining order, the towing boat

has the exclusive control of the movements of the raft, and every movement or stoppage of the steamboat, of the raft, must be viewed, in so far as third parties are concerned, as having been resorted to by him, for the interest of the company. Now, it appears by the evidence on both sides, that these steamboats, with rafts in tow, frequently meet the rising tide at Platon-Point, and that, on such occasions, they must either continue to struggle vainly against it, at a great expense of fuel, steam and labor, even in fine weather, and at the risk of having the rafts broken up (*égrainées*) when the wind is high, or else they must moor at Joly's wharf, and they usually choose the latter alternative. The steamboat turns it's bow upon the raft, and drives it up to the wharf, to which it is moored. It matters not by whom the ropes are attached; the act is that of the captain of the towing boat, and of the company he represents. Then, upon the turn of the tide the steamer takes the raft again in tow, and proceeds towards the point to which the company was bound to carry it, in pursuance of their contract with the owners. To shew the advantages derived by Appellants from Respondent's wharf, I quote the following extracts from the evidence adduced. James Thurber, a gentleman who was brought up in the neighborhood of "Platon Point," and still resides there, says: "A ma connaissance, quand les steamboats vont s'amar-" rer avec leurs cages, dans le beau temps, au commencement " du montant, c'est pour s'épargner des dépenses en charbon " ou en bois, et quand ils vont s'amarrer là, dans le mauvais " temps, c'est pour empêcher les cages d'être emportées et " égrainées. C'est un avantage pour les steamboats et pour les " cages, parce que les steamboats sont obligés de rendre les " cages à Québec; et, quand elles s'égrainent, cela leur fait " perdre du temps pour les rassembler et leur fait faire des " dépenses." And Hammond Gowen deposes as follows: "I " have seen the rafts and steamers moored to the wharf of " Pointe-Platon in perfectly fine weather, when there was no " wind blowing, and, as far as I could judge, no danger of the " rafts being wrecked, if the steamers had not taken the pre-" caution of mooring them to the wharf. And, although I am " no sailor, and do not understand shipping matters, I have " no hesitation in saying that the steamers brought the rafts " to the wharf, for their own convenience: because, when the tide rises, the steamer cannot make way against it, with the raft in tow. I have often watched a steamer with a raft in tow, steaming hard for the five hours during which the tide rises, without apparently making a league, down the river: so I should judge that a steamer coming to the wharf, with a raft in tow, at the rising of the tide, would,

"naturally,save a great deal of fuel,without losing any time." It appears, therefore, clearly that the rafts in questions, having been moored to Respondent's wharf, by the command or permission of the captain in charge of steamboats belonging to Appellants, and in view of their convenience and profit, a *quasi contract* has arisen between Respondent and Appellants, for the wharfage due, as well upon the rafts as upon the steamers themselves. It ill becomes Appellants to plead that Respondent should go in quest of the owners of the rafts for his wharfage dues thereon, when it is proved that Respondent's agent, taking a needless precaution, went to ask at their office, the names of these men; and was corsely told to go and enquire elsewhere.

The judgment of the court below is confirmed, with costs. MONDELET, justice, *dissentiente.* (15 *D. T. B. C.*, p. 70.)

ALLEYN and ALLEYN, for Appellants.

JOLY, for Respondent.

VENTE.—CRAINTE DE TROUBLE.—DEPENS.

SUPERIOR COURT, in Review, Montréal, 25th January, 1863.

Before SMITH, BERTHELOT and MONK, Justices.

TETREAU DIT DUCHARME, Plaintiff, *vs.* BOUVIER, Defendant.

Dans une action par un bailleur de fonds contre un acquéreur pour recouvrer $1,216.66, le prix d'un immeuble, le Demandeur allégua dans sa déclaration que deux hypothèques au montant de $766.66 existaient, affectant la propriété vendue, et offrit de fournir bonnes et suffisantes cautions, avec hypothèque, que le Défendeur ne serait pas troublé en raison desdites hypothèques.

Le Défendeur plaida par exception l'existence desdites hypothèques, et son droit, en vertu de la 31e sec. du stat. cons. du B. C., ch. 36, de retenir entre ses mains le principal et les intérêts, et concluant qu'à moins que le Demandeur ne donnât caution dans un délai à être fixé par la cour, que son action fût renvoyé avec dépens, et le Défendeur déclaré avoir droit de retenir les sommes réclamées.

Le Demandeur, avec sa réponse à ce plaidoyer, produisit des quittances dûment enregistrées de ces deux hypothèques.

Jugé: Que le Demandeur avait droit d'obtenir jugement pour le montant dû, avec les frais de l'action et de la contestation contre le Défendeur. (1)

The action was brought to recover the sum of 7,300 *livres ancien cours* ($1,216. 66), being the whole *prix de vente*, under a deed of sale from Plaintiff to Defendant, of the 11th August, 1863. By his declaration, Plaintiff notified Defendant that the land was hypothecated in favor of Pierre Paul Lacroix, for 4,200 *livres*, and for 400 *livres*, in favor

(1) V. art. 1535 C. C. et 478 C. P. C.

of Denis Prevost, offering also to furnish good and sufficient security, with an *hypothèque* on immoveable property, to secure Defendant from the effects of these mortgages, and, by his conclusions, prayed *acte* of his offer, and for a judgment for the 7,300 *livres*, with costs. By his plea, Defendant set up an indebtedness to him, by Plaintiff in certain sums, thereby making the balance due only $1,110.41, and set up also the *hypothèques* $4,600. Conclusions: That it be declared that these *hypothèques* affected the property sold, that Defendant had just reason to apprehend trouble, and had a right to retain in his hands the sum sought to be recovered (*la somme réclamée*) so long as Plaintiff had not caused the *trouble* to cease, and caused the registered *hypothèques* to be discharged within a delay to be fixed, and that Defendant be authorized to retain in his hands the sum claimed and that Plaintiff's action be dismissed, unless good and sufficient security were given within the delay fixed, and that, in default thereof, Defendant be authorized to keep the monies due in capital and interest, and that Plaintiff's action be dismissed with costs. Answer of Plaintiff: That Defendant could not obtain the dismissal of the action, the debt claimed being due, but could, at most, only obtain a *sursis* or stay of the conclusions of Plaintiff's action, until security was given; he produced, with his answer, discharges of the *hypothèques* duly registered, and prayed *acte* that the sum of $1,110.41 was the only sum due, and for the dismissal of the exception, with costs.

BERTHELOT, Justice: The question raised was as to the operation of the 31st section of the Con. Stat. of L. C., chap. 36. "If the purchaser of any real estate be troubled or has just "cause to fear that he will be troubled by any hypothecary "or revendicatory action, he shall be entitled to delay the "payment *of the purchase money* until the vendor has removed "such trouble, unless the vendors prefer to give security, or "unless it was stipulated in the contract of sale that the pur-"chaser should pay notwithstanding such trouble or the fear "thereof." The main question was as to costs. In the case of *Paquet* vs. *Miclette*, (1) it was held, by Judge Badgley, that, with a clause of *franc et quitte* in the deed, the seller would get judgment with costs against the purchaser, provided there remained enough in Defendant's hands, after payment of the sum sued for, to warrant him from *trouble*. In *Bernesse dit Blondin* vs. *Madon*, (2) the vendor who had not offered security by his action, or answered the plea, was held liable for

(1) 8 R. J. R. Q., p. 78.

(2) 12 R. J. R. Q., p. 5.

the costs of the action. The only case where a Defendant ought to get costs would be where, before action, he tendered the amount due, and notified the vendor to remove the *hypothèques* upon the land. If, notwithstanding such tender, the vendor should bring an action without removing the *hypothèques*, or giving security, he ougnt to pay Defendant's costs. This was not the case here. The Plaintiff notified Defendant of the existence of the *hypothèques*, and offered security, he afterwards got the *hypothèques* duly discharged, and yet Defendant insists on the dismissal of the action, with costs. He could not concur in this pretension.

JUDGMENT: "La Cour, considérant que, par les conclusions de son action, le Demandeur demande acte des offres qu'il fait de donner bonne caution au Défendeur, qu'il ne sera pas troublé comme propriétaire et détenteur de l'immeuble qu'il lui a vendu, à raison des deux créances hypothécaires au paiement desquelles était affecté ledit immeuble, et mentionnées, tant dans la déclaration que dans l'exception, ainsi qu'il y était tenu par la section trente-et-unième du chapitre trente-six des Statuts Refondus pour le Bas-Canada: Considérant que le Demandeur, avec ses réponses à l'exception du Défendeur, a produit les quittances des créanciers desdites deux créances hypothécaires, et que, par conséquent, le Défendeur n'est plus exposé à être aucunement troublé comme détenteur dudit immeuble, et que le Défendeur ne peut plus se refuser au paiement de ce qu'il redoit au Demandeur sur le prix de vente. Vu l'insuffisance des offres et des conclusions du Défendeur en son plaidoyer, a condamné et condamne le Défendeur à payer au Demandeur la somme de $1110.41, étant la balance restant due sur l'acte de vente du onze août 1863, reçu devant Geoffrion et confrère, notaires, consenti par le Demandeur au Défendeur d'un immeuble y désigné, avec intérêts, *ex natura rei*, sur la susdite somme, depuis le premier novembre, 1863, jusqu'à parfait paiement, et les dépens." The following were, in effect, the reasons urged for Defendant in the Court of Review. 1. Because costs were given to Plaintiff, whereas, in law, they should have been given in favor of Defendant. 2. Because the production, subsequent to the filing of the exception, of the discharges filed, shewed Defendant was entitled to urge the *trouble* set up, and which was only put an end to subsequently to the exception, and, therefore, costs should have been given against Plaintiff. 3. Because Plaintiff's action could not have succeeded, without the production of the discharges, and these being produced posterior to his action, he was not entitled to costs.

SMITH, Justice, held that the judgment brought up for review must be confirmed. The Plaintiff had notified Defendant of

the *hypothèques* upon the property, and had caused them to be duly discharged. The conclusions of Defendant's exception did not touch the case of the *hypothèques* being discharged. They prayed the dismissal of the action, with costs in case security was not given within the delay to be fixed by the court.

Jugement confirmé avec dépens contre le Défendeur." (15 *D. T. B. C.*, p. 76.)

MORIN and MARCHAND, for Plaintiff.

ARCHAMBAULT, for Defendant.

VENTE.—CRAINTE DE TROUBLE.—DEPENS.

SUPERIOR COURT, IN REVIEW, Montreal, 25 janvier 1865.

Before SMITH, BERTHELOT and MONK, Justices.

THOMPSON, Plaintiff, *vs.* THOMPSON, Defendant.

Jugé : 1o. Que, lorsque dans une action pour balance du prix de vente d'un immeuble, en vertu d'un acte de vente par le Demandeur au Défendeur, exécuté en 1861, le Défendeur ayant plaidé en vertu du Stat. Con. du Bas-Canada, chap. 36, sec. 31, comme trouble, qu'il y avait des arrérages de cens et rentes pour dix-neuf ans depuis la date d'un acte consenti par la mère du Demandeur au Défendeur, daté en 1842, la cour présumera que le Défendeur était en possession de l'immeuble depuis la date dudit acte de 1842, invoqué par lui, jusqu'à la date du second acte.

2o. Que comme tel détenteur les cens et rentes étaient dus par lui, et il ne sera pas ordonné que cautionnement soit donné pour le garantir de tels cens et rentes.

3o. Que le Demandeur a droit en pareil cas aux frais contre le Défendeur, nonobstant que par le jugement il lui soit ordonné de donner caution contre une réclamation de propriété de la part du vendeur antérieur et sans qu'il eût été offert de cautionnement avant ou par son action.

This was an action brought in the Superior Court, St. Hyacinthe, on a deed of sale of the 26th February, 1861, from Plaintiff, of a lot of land in the seigniory of Monnoir, for $1,055.32, the sum demanded by the action being $527.66. The plea set up, 1o That, in the deed of sale, Plaintiff declared his title to the land to be that of sole heir to his deceased father James Thompson; 2o a sale by Jane Spaulding, widow of James Thompson, to Defendant, by notarial deed of 24th October, 1842. That, as such vendor, she could enforce payment of the purchase money or revendicate the property. That, moreover, the late James Thompson left two children namely: Plaintiff and Adeline Thompson, then and now a minor, who would be proprietors *par indivis* of the land, each for one half, on the supposition that it had not been left to the widow under the husband's will. That, moreover, there was due to the seignior for arrears of seigniorial dues, from the 11th No-

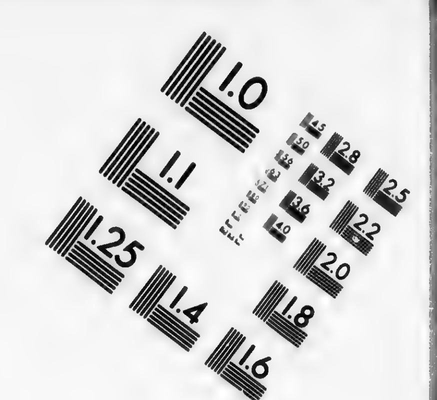
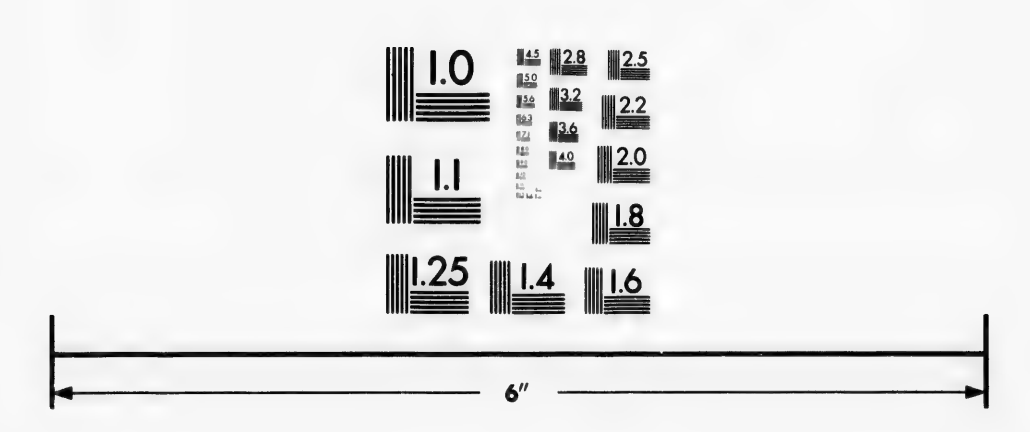


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vember, 1843, to the 11th November, 1860, the sum of £23 16 5, for which the land in question was hypothecated. That therefore, Defendant had been troubled in his possession. Conclusion : That payment of the sum demanded be delayed until the registration of the deed from Mrs. Thompson in the registry office, be made to disappear, that security be given that Defendant shall not be troubled by her or by Adeline Thompson, or by the seignior of Monnoir, for the £23 16 5, and that, in default of giving such security, within a delay to be fixed, Plaintiff's action be dismissed with costs, and that, in case security should be given by Plaintiff, he should still be condemned to costs. Special Answer, that the *cens et rentes* from 1843 to 1860, £23 16 5, were due by Defendant personally, during his occupation of the lot. That no notice was given by Defendant of any apprehended *trouble*, and that Plaintiff was always ready to give security. That Defendant could not demand both for the discharge being registered and for security. Conclusion : For *acte* of Plaintiff's readiness to give security against any claim of Mrs. Thompson or Adeline Thompson. The Plaintiff gave an admission that the sum of £23 16 5 was due on arrears of seigniorial dues, up to 11th November, 1860, also of the marriage of James Thompson and Jane Spaulding, but no evidence was given of the birth of Adeline Thompson, or of the existence of such a person. By the judgment brought up for review, Defendant was condemned to pay the sum demanded, with costs ; the Court declaring, by the judgment, that execution should not issue until Plaintiff gave good and sufficient security against any claim *en revendication* on the part of dame Jane Spaulding, or of Adeline Thompson. In the Court of Review, the grounds urged for the revision of the judgment were, 1o That no costs should have been given to Plaintiff,in as much as he had not offered security before suit,or by his declaration; 2o that the judgment should have condemned Plaintiff to give security for the £23 16 5, *cens et rentes.* For Plaintiff, it was urged, as laid down in Nouv. Denisart, vbo. *Cens*, sec. 4, p. 153, " C'est toujours par le détenteur de l'héritage, légitime ou non, que le cens est dû : " and that Defendant must be held to have been in possession of the lot between the date of the deed to him from Mrs. Thompson, and the deed obtained from Plaintiff, although no proof by witnesses had been made of his actual possession.

SMITH, Justice : In this case, a question comes up under the clauses of the statute referred to in the case just decided. (1) Here the alleged *trouble* is set up to be from a defect in Plain-

(1) *Tetreau dit Ducharme vs. Bouvier, suprà*, p. 456.

tiff's title from there being another heir entitled to half of the property sold, but there is no evidence of there being any other heir than Plaintiff. It is said there are arrears of *cens et rentes*, but these arrears must be paid by Defendant as having been in possession of the lot under the deed he sets up from Plaintiff's mother, down to the date of the deed from Plaintiff. The Court sees no reason for interfering with the judgment brought up for review.

Jugement confirmé, avec dépens. (15 *D. T. B. C.*, p. 80.)

ROY and CARDEN, for Plaintiff.

SICOTTE and CHAGNON, for Defendant.

VENTE.—CRAINTE DE TROUBLE.—DEPENS.

SUPERIOR COURT, Montréal, 30 novembre 1864.

Before BADGLEY, Justice.

COLLETTE, Plaintiff, *vs.* DANSEREAU, Defendant.

Jugé : Dans une action pour un prix de vente, où le Défendeur allègue un trouble en raison d'hypothèques enregistrées contre l'immeuble, quelques-unes desquelles avaient été radiées après l'enfilure du plaidoyer, que le Demandeur obtiendra jugement pour le montant dû, avec dépens jusqu'à la production de tel plaidoyer, et que les dépens subséquents à telle enfilure seront accordés au Défendeur.

This was an action to recover $2,666.66, being the price of a piece of land, and certain moveables, sold with *garantie* against all troubles, &c., to Defendant by Plaintiff, and the widow François-Xavier Collette, *ès-qualité*, under a deed of sale of the 31st July, 1861, the rights of the widow having been made over to Plaintiff by a transfer bearing date the 16th March, 1864. The Defendant, under the Con. Stat. of L. C., cap. 36, sec. 31, pleaded *trouble*, by a mortgage under a judgment obtained by Pierre Jodoin, against the late François-Xavier Collette, of the 4th July, 1857, for £746 2 9, registered the 9th July, 1857, and, by another mortgage, under an obligation of date 26th July, 1857, registered the 18th August, 1857, from François-Xavier Collette in favor of Pierre Jodoin, and that Defendant was entitled to retain the sum demanded by the action, until Plaintiff had discharged *(ait fait disparaître)* the said mortgages. Conclusion, praying *acte* of Defendant's readiness to pay the sum demanded, on Plaintiff registering discharges *(faisant radier)* of these mortgages, or giving security that Defendant should not be troubled by them, and praying that no judgment be rendered in favor of Plaintiff, except *à la charge de faire radier lesdites hypothèques*, or on giving Defendant security, with *hypo-*

thèque on immoveable property, to the satisfaction of the court, that Defendant should not be troubled, the whole with costs against Plaintiff. The Plaintiff set up, in his special answer, and filed a notarial discharge by Jodoin, of the 15th March, 1864, registered the following day (the action being instituted on the 29th April, and returned the 19th May, 1864) for 16,000 *livres de* 20 *sous*, on account of the obligation of the 27th July, 1857, also a notarial discharge of the 17th February, 1864, which does not appear to have been registered, for £300 on account of the judgment, and a settlement of accounts, including the judgment in question, between the widow Collette and Jodoin, of the 2nd March, 1861, registered the 20th October, 1864, by which the balance due to Jodoin was reduced and acknowledged to be £1,364 11 8. A full discharge of the mortgage under the judgment of date 17th October, enregistered 19th October, 1864, was also filed. It was also alleged in the answer that Defendant was well aware of those facts, and that his defence was vexatious and unfounded. Conclusion to dismiss the exception, with costs.

BADGLEY, Justice: In this case a land was sold, and the purchaser, when sued for the price, pleads that there are two mortgages affecting the land, one under a judgment, the other by an obligation, to one Jodoin, and prays for security under the law against the *trouble*. The Plaintiff, by his answer, produces discharges from Jodoin, one of which was registered on the same day as the special answer was filed. The question is as to the costs, the *hypothèques*, both under the judgment and obligation, being now validly discharged; and, by the judgment, Plaintiff will get his costs up to the filing of the plea, and be condemned to pay Defendant costs after the filing of the plea.

JUDGMENT: "The court, considering that, at the time of the filing of his *défense* by Defendant, the allegations therein contained, in respect of the mortgages then existing upon the real estate in Plaintiff's declaration described, for the full price whereof this action was instituted by Plaintiff against Defendant, have been established: And, considering that the discharges and *main-levée* of the mortgages upon the said real estate, were only registered and published after the filing of the said *défense* by Defendant: Considering that Plaintiff hath, since the filing of the *défense*, established the freedom of the said real estate from the mortgages and hypothecation thereon charged in favor of Pierre Jodoin, referred to, and mentioned in, the said *défense*, and that Defendant cannot be troubled by any or either of the said mortgages, doth condemn Defendant to pay and satisfy to Plaintiff the sum of $1,666.66, being for the full price and value of his purchase

of the real estate in the Plaintiff's declaration mentioned, under and by virtue of the deed of sale of the 31st July, 1861, therein described at length, as mentioned in said declaration, with interest thereon from the 1st day of December, 1861, till paid, with costs of suit up to the filing of Defendant's said *défense*, and with costs to Defendant against Plaintiff, of contestation from filing of said *défense*. (15 *D. T. B. C.*, p. 83.)

CARTIER, POMINVILLE and BETOURNAY, for Plaintiff.
DORION and DORION, for Defendant.

BILLET PROMISSOIRE—PAIEMENT.—COMPOSITION.

SUPERIOR COURT, IN REVIEW, Montreal, 25 january, 1865.

Before SMITH, BERTHELOT and MONK, Justices.

EVANS, Plaintiff, *vs.* CROSS *et al.*, Defendants.

Jugé : Que dans le cas d'une action sur un billet promissoire, d'une date antérieure à un acte d'atermoiement avec les créanciers des Défendeurs, y compris le Demandeur, tel billet sera censé avoir été inclu dans l'acte, et l'action sera renvoyée sur preuve de paiement du montant convenu.

This was an action on a note for $213.22, made by Defendants in favor of Plaintiff, and bearing date the 5th May, 1862, payable twenty-four months after date. The Defendants, by their plea, set up an agreement which they alleged had been duly carried into effect between them and their creditors, in the following terms: " The subscribing creditors of " Cross and Park, hereby agree, for themselves, their heirs " and assigns, to accept from said Cross and Park a composi- " tion of ten shillings in the pound, payable with satisfactory " security in equal proportions, at six, twelve and eighteen " months, from the 20th day of March, last past; said compo- " sition when paid to be in full satisfaction and discharge of " our respective claims against them. Provided this arrange- " ment be carried into effect, on or before the first day of " June now next ensuing The amounts of our claims are " placed opposite our signatures in the schedule hereunder." The seventh signature on the schedule was that of Plaintiff's debt $342.40, there being in all thirty-six creditors signing the schedule. The agreement bore no date, although several of the creditors put dates after their signatures, the last signature, the 36th, bearing date May 22nd, 1862.

SMITH, Justice: This action is on a note, dated before an agreement of composition; the answer stated that it was given after the agreement. The note is dated before the agreement,

and is evidence of a then existing debt. The subsequent composition must cover it, and the action must be dismissed.

JUDGMENT: Considering that Plaintiff hath failed to shew any right in law to have and maintain the conclusions of his action, and that Defendants have established that the note now sought to be recovered by Plaintiff was due and owing before the day of the settlement of the *acte* of composition accepted by Plaintiff in full discharge and payment of all claims due and owing by Defendants before that day and that the composition hath been paid by Defendants, the court doth dismiss this action, with costs.

BETHUNE, Q. C.: In the court of review, submitted the following points: 1° There was error in the judgment, in stating the note was due and payable before the settlement, the note in fact not becoming due till the 9th May, 1864. 2° That the agreement shewed the settlement to have been made between Plaintiff and Defendants, on the 25th June, 1862, subsequent to the time limited 1st June, 1862. 3° That the settlement made with Plaintiff was by notes payable at six, twelve and eighteen months, from the 25th June, 1862, and not from the 25th March, 1862, as stipulated in the agreement, and, by another note for ten shillings in the pound, in two years, from 5th May, 1862, without security. 4° That this note last referred to, was the note sued upon, and was only delivered to Plaintiff, on the 25th June, 1862, and the evidence instead of proving a discharge proved there was none. For the Defendants, it was urged: 1° That the evidence of Plaintiff, the only witness examined, shewed: "That the "amount of the note sought to be recovered was composed "for, and that Plaintiff had been paid according to the terms of the composition." 2° That Plaintiff's pretension at the argument, that Defendants had subsequently agreed to pay the note sued for over and above the composition, had not been pleaded nor proved, and that, if Plaintiff could recover upon such an agreement, the action should have been founded upon it.

MONK, Justice: The date of the note in question in this cause establishes that the sum was due before the agreement of composition set up by Defendants. The payment of the composition extinguished all claims of Plaintiff, and the judgment must be confirmed.

Judgment confirmed. (15 *D. T. B. C.*, p. 86.)

BETHUNE, Q, C., for Plaintiff.

COWAN, for Defendant.

PROMESSE DE VENTE.—DOMMAGES.

COUR DE CIRCUIT, Québec, 25 février 1865.

Présent : TASCHEREAU, Juge.

GAGNON, Demandeur, *vs.* FECTEAU, Défendeur.

Jugé : Que pour donner droit d'action en dommages pour non exécution d'une promesse de vente, la promesse doit avoir été rédigée par écrit, ou le Défendeur doit l'admettre formellement.

Le Demandeur, par sa déclaration, alléguait que, le 26 janvier 1865, le Défendeur avait promis de lui vendre, et de fait lui vendit verbalement, un certain immeuble, et que le Défendeur devait en passer contrat devant notaires dans le courant de deux ou trois jours après, au plus tard ; que ce délai expiré, et, subséquemment, le Défendeur avait refusé d'exécuter la vente et d'en passer contrat, ou de donner un titre au Demandeur, le tout au dommage du Demandeur de la somme de £50. Le Défendeur rencontra cette demande par une dénégation générale, et, de plus, plaida par exception péremptoire que la vente verbale, dont était mention dans la déclaration du Demandeur, n'était pas en effet une vente, mais seulement *pourparlers* d'une vente, qui n'avait jamais eu lieu, et que le Defendeur n'avait jamais promis de consentir. Le Défendeur examiné sur faits et articles prouva que, le 26 janvier, 1865, il était entré en marché avec le Demandeur pour lui vendre la propriété en question, que le Demandeur lui avait offert £50, et que lui le Défendeur avait déduit cinq piastres sur £55, la somme qu'il demandait d'abord pour sa propriété, et qu'alors il avait promis au Demandeur de répondre à ses offres dans deux ou trois jours, mais qu'avant l'expiration de ce temps il avait vendu la propriété à un tiers.

TASCHEREAU, Juge : La question soulevée est de la plus grande importance, parce qu'elle n'a jamais été décidée d'une manière satisfaisante : "Une vente verbale lie-t-elle le vendeur ?" La même question s'est présentée dans la cause de *Gaulin et al.* vs. *Pichette et al.*, rapportée au 3e vol. de la *Revue de Jurisprudence*, p. 261. Dans cette cause, les Demandeurs intentèrent leur action pour obliger les Défendeurs de leur consentir un acte de vente pour une propriété qu'ils leur avaient vendue verbalement, avec promesse d'en passer contrat. En Cour Inférieure, un des juges était pour maintenir l'action, les deux autres se divisaient quant aux raisons, mais arrivaient à la même conclusion de débouter l'action. En mars, 1848, le jugement de la Cour Inférieure déboutant les Demandeurs fut confirmé en appel, à la majorité de trois juges contre deux. La question n'est donc pas décidée d'une manière satisfaisante, et

il faut m'en rapporter à mes propres lumières. Plusieurs autorités ont été citées de la part du Demandeur, mais, si on les considère avec attention, on verra que, pour maintenir une action fondée sur une promesse de vente, il est nécessaire que la promesse de vente soit ou par écrit, ou qu'elle soit prouvée, par l'aveu de la partie, d'une manière si claire, si satisfaisante, qu'il ne peut y avoir le moindre doute que la promesse ait été donnée. Si l'on consulte Pothier, *Obligations*, No. 11, on voit que, dans la première partie de cette autorité, il s'agit d'une vente sous seing privé, avec la condition, la promesse, d'en passer contrat devant notaires ; dans la deuxième partie de ce numéro, Pothier parle des promesses de vente verbales, et il dit que la déclaration ou l'aveu de la partie sur laquelle on se repose pour la preuve de cette promesse de vente doit être pris en son entier. L'aveu du Défendeur en cette cause ne renferme pas une admission de promesse de vente. Troplong, Contr. de Vente, vol. 1, Nos. 18, 19 et 114, soutient la même jurisprudence. L'objet de cette autorité est d'établir que toute promesse de vente lie les deux parties, même avec condition d'en passer acte par écrit. (1) De ces autorités, il résulte, suivant moi, que, lorsqu'il appert, par acte sous seing privé, ou par l'aveu d'une partie, qu'il y avait une promesse de vente, les parties sont obligées d'en passer contrat, ou la partie est responsable pour les dommages causés à l'autre, si elle refuse de passer tel contrat. Il faut donc avoir ou une promesse de vente par écrit, ou l'aveu de la partie, pour former un commencement de preuve par écrit. Il y a loin d'un aveu dans les réponses sur faits et articles dans cette cause. Les questions peuvent se réduire à celle-ci : N'est-il pas vrai que vous avez promis de me vendre, etc. ; et la réponse du Défendeur, quoique un peu longue et explicative de tout ce qui s'est passé, est en effet : Non, je n'ai pas promis. Je crois donc que la vente n'étant pas avouée par le Défendeur, et le commencement de preuve n'existant pas, l'action doit être renvoyée. Action renvoyée, avec dépens. (15 *D. T. B. C.*, p. 89.)

TESSIER, ROSS et HAMEL, pour le Demandeur.

LÉGARÉ et MALOUIN, pour le Défendeur.

(1) Voyez aussi 16 Duranton, Nos. 49 et 58.

LEGS.

SUPERIOR COURT, Montréal, 30 novembre 1865.

Before MONK, Justice.

JONES, Plaintiff, *vs.* PENN *et ux.*, Defendants.

Jugé: Qu'une action contre des exécuteurs et légataires universels pour contraindre l'exécution d'une disposition testamentaire faite dans les termes suivants : "Mon désir est aussi que l'hypothèque subsistant contre la propriété de Mme Hawley (la Demanderesse) soit "payée sur les argents maintenant en banque à mon avoir," sera maintenue; et un jugement sera prononcé, condamnant les Défendeurs à payer le montant de telle hypothèque à la Demanderesse, qui avait été elle-même obligée de la payer au créancier.

The action was brought against the surviving executor and executrix who were also the universal legatees of the testatrix, under the last will of Ann Jones, under the following clause in the will: "My desire also is that the mortgage now sub-"sisting against Mrs. Hawley's (the Plaintiff) property, be "paid from and out of the money now in bank to my credit." The declaration set up a mortgage for £105, given by Plaintiff and Pamela Jones, in favor of John Romaines, of date the 6th July, 1857, and prayed that Defendants be condemned: "to pay and discharge the said mortgage," to produce a sufficient voucher for the payment, and, in default thereof, to pay the £105 to Plaintiff, with interest from the date of the mortgage, and costs. The Defendant pleaded, by exception, that the action was unfounded, chiefly on the ground that the mortgage was shewn to be a joint mortgage, and the action should have been brought by Plaintiff, jointly with Pamela Jones. This exception was dismissed. There was also a plea to the effect that the bank referred to in the clause of the will, was the city bank, Montreal, and that, at the time of the death, there was no larger sum in the bank than $108, which was the only fund out of which the mortgage could be paid off, which sum, with interest, they offered with their plea to pay, to discharge the mortgage in question.

MONK, Justice: Held Defendants liable to have the mortgage discharged from Plaintiff's property; and that there being a joint mortgage was of no importance. The Defendants had made no inventory, they had given no valid reason for refusing to have the mortgage paid, and they must be condemned to pay it, even from other funds than the moneys in the bank. The petition filed by Plaintiff, praying to be allowed to amend the conclusions of her action and for a condemnation in Plaintiff's favor, will be granted, she having been compelled

to pay the mortgage, and the judgment will be that the amount of the mortgage, £105, be paid to Plaintiff.

JUDGMENT: Considering that Plaintiff hath a right, under the last will of Ann Jones, to have and demand from Defendants a legal and sufficient discharge of a certain mortgage for £105; and considering that Defendants, in their said capacities, have neglected and still neglect to discharge said mortgage; and, further, considering that it appears from the evidence that Plaintiff hath been compelled to pay, and hath in fact fully paid said mortgage, to the full amount thereof: the court, adjudicating upon the conclusions of Plaintiff's declaration, and the petition of Plaintiff, doth grant said petition, and doth adjudge and condemn Defendants, as being the executors and universal legatees of Ann Jones, to pay and satisfy to Plaintiff, the sum of £105, with interest from the 6th July, 1857, until paid, and costs. (15 *D. T. B. C.*, p. 92.)

CROSS, Q. C., for Plaintiff.

PERKINS, for Defendants.

PREUVE.—STATUT DES FRAUDES.

SUPERIOR COURT, EN REVISION,

Montreal, 30th November, 1864.

Before SMITH, BERTHELOT and MONK, Justices.

BAYLIS, Plaintiff, *vs.* RYLAND, Defendant.

Dans une action pour contraindre un Défendeur à accepter livraison et à payer pour des tapis faits pour lui, la déclaration contenant un chef pour effets vendus et livrés, il fut produit un plaidoyer aux termes de la 17e section du statut des fraudes.

Jugé: Dans la Cour Supérieure: 1° Que le statut des fraudes a été reconnu par la jurisprudence du Bas-Canada, antérieure et depuis l'acte provinciale 10 et 11 Vict., ch. 11, comme étant en force comme règle de témoignage en matières commerciales.

2° Que, néanmoins, le Demandeur n'avait pas le droit, en vertu du statut des fraudes, de considérer l'admission du Défendeur sur son examen comme témoin, ou lors de ses réponses à des interrogatoires sur *faits et articles* comme commencement de preuve par écrit, comme il aurait pu le faire en vertu de l'ordonnance de Moulins.

3° Que, dans l'espèce, si le témoignage oral des commis du Demandeur, pris sous objection, faisait preuve valide, la cause du Demandeur était prouvée; mais que ce témoignage étant rejeté comme illégal, sur motion du Défendeur, l'action devait être renvoyée.

4° Que la confection des tapis n'était pas une incorporation de travail et de matériaux qui constituait une livraison et acceptation aux termes dudit statut.

Jugé: Dans la Cour de Revision: 1° Que le jugement du tribunal inférieur sera maintenu par la raison que quoique le Défendeur eût admis, lors de son examen comme témoin, la commande et la confection des tapis et leur valeur, néanmoins il avait ajouté qu'iceux n'étaient payables

que sur livraison à bord d'un vapeur, au lieu d'être livrables au magasin du Demandeur, et ce, quoiqu'aucun plaidoyer à cet effet n'eût été produit.

2o. Qu'une admission faite par un Défendeur, examiné comme témoin, équivaut à la note ou memorandum écrit, auquel il est référé dans le Statut des Fraudes. (1)

3o. *Il semble*: Que lorsque des tapis ont été commandés le 13 septembre, et d'autres effets d'une valeur moindre que £10 sterling ont été achetés le 13 octobre, l'action ne peut être maintenue pour la valeur de ces derniers effets de même que si les transactions étaient distinctes et séparées.

The action was brought to recover $245, for furnishing and making certain carpets which, it was alleged, "Defendant selected from the stock of Plaintiff, and requested him to have "the same made according to directions then and there given "by Defendant, who then promised to take delivery thereof, "so soon as the same should be made up, and to pay for the "same in cash on delivery," also, that the carpets were made, and that Defendant refused to receive them. There was also a count for goods sold and delivered: Conclusion praying *acte* of Plaintiff's readiness to deliver the carpets, and that Defendant be condemned to receive them and pay for them, with costs. The Defendant pleaded the Statute of Frauds, 29 Charles II, and alleged that Defendant had not accepted any of the carpets, nor was any payment made on account, nor any memorandum in writing signed as required by the act. A *défense au fond en fait* was also filed. The Plaintiff examined three clerks in his service at the time, who proved the order for the carpets, and that they were made according to the dimensions furnished by Defendant, also, their value. These witnesses were examined under reserve of objection. The Defendant was also examined as a witness, and admitted that he had ordered the carpets, and had handed to the Plaintiff the measurements of the rooms, that he did not contest the quantity or value of the goods; but did not admit that the delivery was to be made at Plaintiff's shop, stating, "I, at "Plaintiff's request, selected certain carpets, and gave him an "order for the same to be delivered on board the *St. Helen* "steamer, to Mrs. Ryland, in the month of october, that year "1862, adding that they were to be paid for on delivery on "board the vessel."

LORANGER Justice: The question raised is one of proof; Defendant pleaded the Statute of Frauds which enacts: (2) "That no contract for the sale of any goods, wares and mer- "chandises for the price of ten pounds sterling or upwards, "shall be allowed to be good, except the buyer shall accept

(1) V. art. 1235 C. C.

(2) 29 Chas. II, chap. 3, sect. 17.

" part of the goods so sold, and actually receive the same, or " give something in earnest to bind the bargain, or that some " note, or memorandum in writing, of the said bargain, be " made and signed by the parties to be charged by such con- " tract, or their agents thereunto lawfully authorized." Did this prevent oral evidence of the contract set up in this case? Did the statute constitute a rule of evidence? He held it did; and this had been the jurisprudence in England, and also in Canada before the 10 and 11 Vict., chap. 11. In the case of *Fry* and the *Richelieu Company*, (1) it was stated that the Statute of Frauds was the same in its tenor and effect as the Ordonnance de Moulin. If this were the case, the prohibition of the Statute of Frauds was not absolute, and the proof might be supplied by the *aveu judiciaire*, since, by the 41 Geo. III, chap. 15, the *serment décisoire* was allowed, even in commercial cases, and another statute (2) allowed parties to be examined on interrogatories *sur faits et articles* in such cases. The effect of the french law left a party with supplementary means of completing his proof by interrogatories and the decisory oath; it recognized the contract over 100 livres as a valid contract, and when proved by the supplementary means referred to, the Courts enforced it. He held the english law to say, there was no *valid contract* unless there was an acceptance, earnest or a note or memorandum of payment. If this was the true sense and meaning of the clause in the Statute of Frauds, then Plaintiff's action must be dismissed, inasmuch as the admissions obtained from the examination of Defendant as a witness, could not avail, there being no valid existing contract, and no acceptance, earnest, note or memorandum in writing. He admitted the evidence of Plain-

(1) Le 3 août 1858, Fry, par contrat sous seing privé, avait vendu à la compagnie Richelieu une cargaison de charbon qu'il avait garanti verbalement être de la meilleure qualité. Sur livraison, la compagnie Richelieu avait payé ce charbon. Quatre jours après, le 7 août 1858, Fry avait vendu à la même compagnie, par un autre contrat sous seing privé rédigé comme le premier, une autre cargaison de charbon et, de même que pour la première cargaison, il l'avait garanti comme étant de la meilleure qualité, mais Fry, au lieu de livrer du charbon de la meilleure qualité; avait fait livraison d'un charbon de qualité inférieure. *Jugé*: Que le second contrat sous seing privé, bien que de même teneur que le premier, ne comportait aucune garantie que le charbon vendu par le second contrat serait de la même qualité que celui délivré en vertu du premier; qu'en vertu du Statut des Fraudes, la preuve verbale ne pouvait être admise dans l'espèce pour établir la garantie verbale, parce que cette preuve tendrait à contrôler les conditions d'un contrat par écrit; qu'en conséquence la Compagnie Richelieu était tenue de payer le prix du charbon, stipulé par le second contrat, de même que si ce charbon eût été de la première qualité. (*Fry* et *La Compagnie Richelieu*, C. B. R., Montréal, 16 septembre 1859, AYLWIN, J., DUVAL, J., MEREDITH, J., et MONDELET, J., infirmant le jugement de C. S., 7 R. J. R. Q., p. 298.)

(2) 12 Vict., chap. 38, sect. 39.

tiff's clerks, if it were held to be legal testimony, established Plaintiff's case, but the evidence had been taken subject to objections, and a motion was made to reject it, which motion must be granted. Another point had been raised by Plaintiff, viz: that the work of Plaintiff had been incorporated with the materials, and that, therefore, a delivery to the vendee must be held to have taken place. In some cases, this was true, as where a piece of cloth had been made into a coat, or gold made into a bracelet. But, in this case, he could not hold the principle contended for by Plaintiff. Allusion had been made to a letter of Mr. Ryland to Plaintiff, dated 24th November, 1862, in which he stated: "that the steamers between "Brockville and Kingston, will cease running the 29th of this "month, as the land roads therefore, between Belleville and "Pictou, will scarcely be passable before the middle of "January, you will have to keep the carpets till the opening "of the navigation, and I shall have to get on as well as I "can till then with my old carpets." He did not hold this to be a note or memorandum in writing, sufficient under the Statute of Frauds; it might perhaps serve as a *commencement de preuve*, but, if the view he had taken of the statute were correct, a *commencement de preuve* could not be held to make the contract a valid and binding contract. The plea of Defendant founded on the Statute of Frauds must, therefore, be maintained, and Plaintiff's action dismissed.

ROBERTSON, inquired whether if the same admission had been given by Defendant in answers to interrogatories, as were contained in his deposition, the judgment of the Court would have been otherwise. The learned judge stated that, under the view he had taken of the statute, the judgment could not be affected by the mode of obtaining the *aveu*.

"La Cour, après avoir entendu les parties, tant sur le mérite que sur deux motions faites et produites par le Défendeur, ayant pour objet, l'une, que la décision de l'honorable juge siégeant à l'enquête, admettant le témoignage verbal du Défendeur soit déclarée illégale et inadmissible, et, en conséquence, rejetée du dossier; et l'autre demandant que la Cour adjuge maintenant sur les objections faites par le Defendeur, en Cour d'Enquête, à l'examen des témoins du Demandeur, et de chacun d'eux, savoir: James McDonough, Edward Sharpe, et Michael Prynne, et que telles objections soient déclarées bonnes et valables, et que lesdites dépositions des susnommés soient rejetées de la procédure; maintient les objections faites par le Défendeur aux questions faites par le Demandeur aux témoins, tendant à prouver la vente alléguée aux libelles du Demandeur. Et adjugeant sur le mérite: Considérant que le statut impérial, passé dans la vingt-neuvième année du règne

du roi Charles II intitulé, "Un acte pour la prévention des fraudes et du parjure," qui prononce l'invalidité de toute vente de marchandises pour dix louis et plus, si ces marchandises ne sont reçues et livrées, en tout, ou en partie, ou si quelque chose n'est donnée pour assurer le contrat par forme de paiement partiel, où à moins qu'il n'y ait un écrit signé par les parties contractantes, ou leur agent, pour faire foi du contrat, faisait partie lors de la passation de l'ordonnance provinciale vingt-cinquième George III, chapitre deux, comme il le fait encore aujourd'hui, des règles de témoignages prescrites par les lois d'Angleterre, et qui ont été par ladite ordonnance introduites en ce pays en matière de commerce. Attendu qu'il appert que nulle partie des marchandises dont le Demandeur réclame le prix par la présente demande n'a été livrée au Défendeur, ou acceptée par lui, qu'il n'y a rien eu de livré pour assurer la vente de ces marchandises, ou en paiement partiel du prix, qu'il n'y a pas eu non plus d'écrit signé par les parties ou leur agent pour constater cette vente, et que, partant, aux termes du statut impérial, la vente est invalide, et qu'il n'y en a pas eu d'ailleurs de preuve légale, a débouté et déboute le Demandeur de son action, avec dépens." At the argument, before the Court of Review, another point was argued by Plaintiff's counsel, namely, that Plaintiff was entitled to judgment for the last item of the account, on the count for goods sold and delivered. This item was for 26 yards of Manilla, sold October, the 13th. All the items as to the carpets were under date Sept. 13, and it was contended that the purchase, in October, being under ten pounds sterling, and being made a month after the purchase of the carpets could not be held as included in the former purchase, and that, therefore, the Statute of Frauds was not applicable.

MONK, Justice: This action was for goods bargained and sold, which Defendant is alleged to have refused to receive. The Defence rests wholly on the Statute of Frauds. The Defendant, examined as a witness, admits the order for the carpets, and that they were made at his request and from measurements furnished on his behalf by Mrs. Ryland. The court holds these admissions were legally made, and that they are equivalent to the note or memorandum required by the statute. Whether these admissions are to be found in the plea, or on oath or in answers to interrogatories is of little consequence. This court does not concur in the view taken by the court *a quo* on this point, but will confirm the judgment dismissing Plaintiff's action, on the ground that the contract alleged is not made out in proof. The Defendant says the goods were to be delivered on board the steamer and not at Plaintiff's shop. The Plaintiff should have alleged the con-

tract as one requiring delivery on board the steamer, and should have proved a delivery or tender of the goods, the learned judge read the letter of the 24th November referred to, and held it did not change the contract as to the place of delivery, it only postponed it. On the ground, therefore, that the contract admitted was different from that alleged as to the place of delivery, the judgment would be confirmed. Judgment confirmed. (15 *D. T. B. C.*, p. 94.)

ROBERTSON, for Plaintiff.

MACKAY and AUSTIN, for Defendant.

CAUTIONNEMENT.

COUR DU BANC DE LA REINE, EN APPEL,

Montréal, 8 juin 1867.

Présents : DUVAL, J. en C., DRUMMOND, J., BADGLEY, J., and MONK, J.

V. P. W. DORION, Défendeur en Cour Inférieure, Appelant, *et* JOSEPH DOUTRE, exécuteur testamentaire de PIERRE DOUTRE Demandeur en Cour Inférieure, Intimé.

Jugé : Que celui qui se porte en faveur du cessionnaire d'une créance caution du débiteur cédé, est déchargé de son cautionnement, si le cessionnaire néglige de faire signifier son transport et si le débiteur paie au cédant.

The action was brought by Plaintiff, an executor and administrator under the will of Pierre Doutre, against Dame A. A. Routhier, widow of the late François Edmond Dorion, and V. P. W. Dorion. The declaration set up a notarial obligation of the 18 january 1860, consented to by Dame A. A. Routhier, acting by François Edmond Dorion, her husband, and separated from him as to property, in favor of Pierre Doutre for $360 payable in 60 monthly instalments of six dollars each: The obligation contained the following amongst other clauses. " Il est expressément convenu entre les parties, comme condition essentielle des présentes, et sans l'assurance de l'exécution de laquelle, elles n'auraient pas eu lieu, qu'arrivant trois payements mensuels dûs et non payés, ledit créancier pourra, si bon lui semble, exiger le remboursement et payement en entier de ladite somme, ou de la balance alors due, sans qu'il soit besoin d'observer aucune formalité judiciaire ; cette clause est non comminatoire, mais de rigueur. Et pour sûreté et garantie du remboursement et payement de ladite somme de trois cent soixante dollars, aux termes et de la manière ci-dessus expliquée, ledit débiteur, ès-qualité, cède et trans-

porte par les présentes, audit Pierre Doutre, ce acceptant, comme garantie collatérale, la somme de quatre cents dollars, due à Anne Aurélie Routhier, son épouse, avec plus forte somme, par François d'Assise Richard, ainsi qu'il appert par transport par Antoine A. Dorion,à Anne Aurélie Routhier, sur François d'Assise Richard, en date du 31 décembre dernier (1859), passé devant P. Mathieu et son confrère, notaires, à Montréal; à prendre ladite somme de quatre cents dollars sus-transportée, par Pierre Doutre, sur et à même les quatre premiers paiements à devenir dûs et exigibles aux termes du transport, c'est-à-dire, cents dollars le premier mai prochain et $100 le premier mai chaque année en suivant, jusqu'à entier et final paiement de ladite somme de trois cent soixante dollars. Pour par Pierre Doutre, ou ses ayants cause, à défaut par François Edmond Dorion, ès-qualité, de se conformer aux présentes, demander, toucher et recevoir du débiteur sus-nommé, François d'Assise Richard, les sommes par lui dues et sus-transportée et en jouir, user, faire et disposer comme bon lui semblera en pleine propriété." This obligation was set up in the declaration, also that the transfer had not been signified to Richard and that he had given back the land to the vendor, Dorion, in payment of the amount due her, and also an undertaking by the other Defendant under a letter in the following terms. "Montréal, 18 janvier, 1860. MONSIEUR, Ayant pris communication de l'obligation et transport consenti ce jour par Anne Aurélie Routhier, en faveur de Pierre Doutre, je me porte caution de Anne Aurélie Routhier, pour le paiement par François d'Assise Richard, y nommé, de la somme de quatre cents dollars à vous transportée par ledit acte. (Signé) V. P. W. Dorion. A. P. Doutre, Ecuyer, Montréal." It was alleged that the monthly instalments had been paid until about the 15 March, 1862, and that more than three instalments had become due, and that Plaintiff was entitled to claim the balance due under the obligation, $200, for which a joint and several condemnation was prayed. The Defendant Dorion pleaded by two exceptions: 1. Setting up the obligation and letter according to their terms, and alleging that, under the letter, he in no way became surety for the payment *of the obligation*, but only that Richard should pay the sum of $400 transferred to Pierre Doutre; that Pierre Doutre, having failed to signify the *transport*, the debtor Richard had paid the amount to A. A. Routier, and had obtained a valid discharge, by which the debt was extinguished and the surety discharged. The 2nd exception set up that, inasmuch as Pierre Doutre, by his negligence and default in not signifying the *transport*, had lost his recourse against Richard, and had thus rendered it impossible

to execute a cession of his rights in favor of Dorion, as surety, he, Dorion, was thereby discharged from all liability under the letter referred to. The Plaintiff's answer to the 1st exception was, that, by the letter, Defendant, Dorion, became surety for Dame Routhier for the payment of the sum transferred, and did not become surety for Richard, who was not a party to the principal obligation of Dame Routier, nor to the accessory obligation of Defendant Dorion, that the signification of the *transport* fell upon Dorion, and not on Pierre Doutre, between whom and Richard no *lien de droit* existed, as appeared from the allegation of the exception. An answer was made to the second exception, that Pierre Doutre was never in a position to cede to Dorion any rights against Richard, never having had any, and the only rights of which Dorion could demand a cession were those against Dame Routhier, which Plaintiff declared he was ready to cede on payment of the sum demanded. Admissions were given of the quality of F. E. Dorion and of his wife; the signature of Defendant, Dorion, to the letter of the 18th January, 1860, and the signature of François E. Dorion to a writing filed at *enquête*, were also admitted; the writing in question was in the following terms: " Montréal, 18 janvier, 1860. A un mois de cette date, je promets fournir à Pierre Doutre une copie de la signification d'un transport par moi en sa faveur, et ce pour valeur reçue, si non ledit Pierre Doutre pourra faire signifier ledit transport à mes frais. (Signé) Frs. E. Dorion, A. A. Dorion." Jugement de la Cour de Circuit, Montréal, 31 sept. 1864.

Loranger, Juge. " Considérant que, par la lettre missive du 18 janvier, 1860, produite par le Demandeur, le Défendeur Vinceslas P. W. Dorion s'est porté, en faveur de Pierre Doutre, caution de la Défenderesse, au regard des obligations contractées par elle vis-à-vis Pierre Doutre, par rapport au transport de la somme à elle due par Français d'Assise Richard, et de la due exécution de ces obligations, que la Défenderesse, a manifestement violées, en recevant la somme transportée, ce qui a donné droit à Pierre Doutre, ou ses représentants, de réclamer de Vinceslas P. W. Dorion la somme de deux cents dollars, aussi bien que de la Défenderesse : Rejette les exceptions de Vinceslas P. W. Dorion, fondées sur le défaut de signification du transport en question à Richard, tel défaut de signification ne pouvant être invoqué comme un moyen valable de défense à l'action du Demandeur."

It was from this judgment that revision was demanded.

Monk, Justice, *dissenting*, held that Dorion became surety that Richard would pay his creditor. Either the debtor or creditor might have made the signification, but it lay emphatically on Madame Routhier to do so. Signification was not made

at all, and Richard paid Madame Routhier. He did not hold Dorion liable, under the action as brought, perhaps he might be liable in an action of a special character. He could not agree with the principle of the judgment which condemned Dorion, on the ground that it was his duty to make the signification; now Dorion could not legally call upon the notary to make the signification; and had not bound himself to do it. In matters of security, the interpretation should be strict, and, in favor of the surety, and, in case of doubt as to the meaning of the contract, the interpretation should also be in his favor. So also in case of doubt as to whether it was his duty to signify the *transport*, the surety should have the benefit of the doubt. He thought the duty of signification fell first upon Madame Routier, then on Doutre, and that the judgment should be reversed.

SMITH, Justice: Held that the undertaking of the caution was that the moneys due by Richard should be paid to the creditor Doutre. This payment was guaranteed by Dorion, not merely that the moneys should be paid to Madame Routhier, but also that, if she received them they should be paid over to her creditor. He held Madame Routhier was bound to signify the transport, and Dorion the *caution* was equally bound to do so. The judgment brought up for review was, in every respect, well founded.

BERTHELOT, Justice: Stated the case had given him a good deal of trouble. The general rule was, that when one has a surety he might sleep sound. It was said the *caution* had no right to cause the signification to be made, but it was one of the rights of a surety to see that the debtor did what the law obliged him to do. He could put the debtor *en demeure*; so Dorion could have said to Madame Routhier, "See that the " transport is signified within a delay, or I shall have signifi- " cation made at your expense." These were the considerations which had influenced him in rendering the judgment.

Judgment confirmed M. Justice Monk dissenting. (1)

The Defendant Dorion appealed.

DUVAL, C. J.: The judgment must be reversed. We are all decidedly of opinion that it was for the creditor to signify the transfer. It has been said that this woman, Anne Routhier, in receiving the money subsequently, has not done right. To

(1) Authorities referred to by Plaintiff upon hearing in the Court of Review: Troplong, Cautionnement, Nos. 562, 568; Massé, Dict. Com., vbo. Aval, Nos. 1, 2, 3, 13, 18, 19; Gouget et Merger, Dict., vbo. Aval, Nos. 3, 4, 6, 7, 9, 18, 21, 26, 29, 30; Pardessus, Droit Com., 394; 1 Nougier, pp, 315, 321; Code Civil, No. 1691; 12 Dalloz, Jurisp., vbo. Vente, Nos. 2, 17; 16 Duranton, Nos. 17, 486, 487, 488.

this, it must be answered that the *caution* has nothing to do with that. The *considerants* of the judgment are:

Considérant que feu Pierre Doutre, représenté par le Demandeur en Cour de Circuit, a négligé de faire signifier le transport fait audit Pierre Doutre par Anne A. Routhier, de ses droits, actions et hypothèques contre Richard; qu'en conséquence de tel défaut de signification, ledit Pierre Doutre a, par sa faute et négligence, *perdu son recours* contre ledit Richard, *et s'est par là mis dans l'impossibilité de céder ses droits et actions à l'Appelant*, V. P. W. Dorion, qui est déchargé de sa responsabilité comme caution, etc. Judgment reversed and action dismissed. DRUMMOND, BADGLEY and MONDELET, JJ., concurred. (15 *D.T.B.C.*, p. 110, et 3 *L.C.L.J.*, p. 119.)

DORION et DORION, for the Appellant.

DOUTRE et DOUTRE, for the Respondent.

CORPORATION MUNICIPALE.—TAXES.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 16 Septembre 1864,

Before DUVAL, Chief-Justice, MEREDITH, MONDELET, DRUMMOND and BADGLEY, Justices.

HENDERSON, Appellant, *and* THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF QUEBEC, Respondents.

Jugé: 1o Que la Corporation de la Cité de Québec, en vertu de la 22me Vic., Cap. 63, a le pouvoir et est autorisée, à passer un ou des règlements imposant une taxe ou cotisation sur les agents de Compagnies d'Assurance organisées dans d'autres endroits, ou dont le bureau principal est établi en dehors de la juridiction de ladite Corporation.

2o Que le règlement sur lequel la Corporation de la Cité de Québec se base, dans l'espèce, a été fait antérieurement au Statut invoqué comme donnant à la Corporation le pouvoir de faire le règlement en question

The action was brought in the Recorder's Court, in the City of Quebec, on the 16th April, 1862, by the Corporation of the City, to recover the sum of $500, "for duty imposed on Defendant, as agent in the City of the Provincial Fire Assurance Company, and acting, doing and transacting business as such, in the said City of Quebec, for the Provincial Fire Assurance Company, for the year 1861," The Defendant resisted the demand, principally on the following grounds: 1. Because the by-law imposing the tax sought to be recovered from him, was illegal, inasmuch as it did not appear to have been passed at a regularly convened meeting of the City Council, or at a time when the Council had any right, by law, to impose a tax on agents for Insurance Companies. 2. Because in imposing a

tax on the Agents in Quebec of Companies established in other places, the Council went beyond the powers conferred upon them by law. The judgment of the Recorder, pronounced on the 19th September, 1862, condemned Appellant to pay to Respondents $500, for the causes stated in the declaration, with interest and costs. It was from that judgment that an appeal was instituted.

IRVINE, for Appellant: The by-law of the council relied upon by Respondents as authorizing the imposition of this tax, is headed as follows: " At a special meeting of the council of the city of Quebec, held at the city hall, in the said city,on Friday, the twenty-ninth day of the month of April, and adjourned from that day to Tuesday, the tenth day of May following, in the year 1859, in virtue of a by-law made and passed at a special meeting of this council, held on the 21st day of August, 1857, and adjourned from the twenty-first day to the twenty-fifth day of the said month of August: at each of which several meetings were and are present two-thirds of the members composing the council of the city of Quebec, that it to say: (here follow the names of the councillors present) it is ordained and enacted, and we the said council, do ordain and make the following by-law." The twenty-second section of this by-law has reference to the case in question, and is in the following words: " That a tax or duty of £125 be and is hereby imposed upon, and shall be yearly payable by all and every Fire Insurance Company, or agency of any Fire, Marine or Inland Insurance Company in this city, (Life Insurance Companies excepted) and by each and every person, firm of persons, corporate body or society carrying on the business of insurance against loss by fire, or against the risks of the sea, or the risks of inland navigation, in this city; and also by the agent or agents in the city of all and every insurance company, and of all and every person, firm of persons, body corporate or society, carrying on the business of insurers against loss by fire, or against the risks of the sea, or of inland navigation, in foreign parts, or established elsewhere than in this city, but acting as such, and doing and transacting the business of insurers, and insuring in this city through any agency therein; the said tax or duty of £125, to be payable by the said agent or agents, and that separately and distinctly for each and every such insurance company or insurance campany agency, and for each and every such person, firm of persons, corporate body or association, for which they shall act as agent or agents, as aforesaid." The act of parliament in virtue of which it is pretended that the council had authority to pass this by-law, is the 22nd Vict., chap. 63, sec. 6. By this act, the powers of the city corporation

are extended so as to enable them to reach several classes of persons whom they had previously no power to tax; the words referring to the particular class of cases now in question, are: " On all agents of or for any insurance company or companies in the said city, and all premises occupied by such insurance agent or agents, of or for any such company or companies, in the said city." This act received the royal assent and became law on the 4th May, 1859. The first point to be considered is whether the council passed the by-law in question at a regularly convened meeting of the council; and whether, at the time the by-law was passed, the existing law authorized the imposition of the tax sued for. The by-law purports to shew on its face the manner in which it was passed, in order to establish its regularity, and to show that the council was within its jurisdiction in enacting it; and it will, no doubt, be conceded, that if it appears, by its own shewing, to be illegal, it should be treated as a nullity. The act 18 Vict., ch. 159, consolidating the laws relating to the city of Quebec, enacts at the 47 sec. that: " The said Council shall, and may, meet for the despatch of the business of the said city, at such fixed periods as may be determined by a by-law, and may adjourn from time to time to such day as they think fit, giving notice then to all the Councillors not present at the ajournement." The Council, by a by-law passed in virtue of this clause, fixed Friday in each week for its regular day of meeting. The introduction to the by-law on which this suit is based purports to shew all the proceedings which were taken when it was passed, and speaks of a special meeting of the Council held on the 29th April, 1859, and adjourned to the tenth of May following, but does not mention that any notice of the second meeting was given to the Councillors who were not present at the adjournement of the first. The other objection on this head is more serious; it appears that the by-law was passed at a special meeting of the Council held on the twenty-ninth of April, 1859, which meeting it is stated was adjourned to the tenth May; but it is not distinctly explained whether the by-law was passed at the meeting of the twenty-ninth April, or at that of the tenth May, although the litteral meaning of the words would seem to imply that it was at that of the twenty-ninth April. Now, the law authorizing the imposition of this tax was only passed on the fourth May, or in the interval between the two meetings, and if it do not clearly appear that the by-law was passed after the Statute, it must be illegal. The last objection is that the Statute only authorizes the imposition of a tax upon agents of Companies which are established in the city, and the by-law imposes the tax on the Agents of Foreign

Companies, thus going beyond the power, conferred by the law.

BAILLARGÉ, pour les Intimés: Par le statut 18 Victoria, chapitre 159, section 51, paragraphe 1er, le Conseil de la Cité de Québec est autorisé à imposer un droit ou des droits "*sur les Compagnies d'Assurance, leurs agences et les lieux par elles occupés.*" Le statut de 1859, 22 Victoria, chap. 63, sec. 6, amende le paragraphe ci-dessus cité, en décrétant que les mots suivants y seront ajoutés, savoir: "*Sur tous agents de ou*
"*pour aucune Compagnie ou Compagnies d'Assurances dans*
"*ladite Cité, et tous les lieux occupés par tout tel agent, ou*
"*tous tels agents de ou pour telle Compagnie ou Compagnies*
"*dans ladite Cité.*" L'Appelant prétend que les mots, dans ladite cité, sont limitatifs, en ce sens qu'ils signifient seulement les assurances établies dans la cité de Québec, et leurs agences dans ladite cité. Comme on le voit, il ne s'agit que de l'interprétation des mots *dans ladite Cité.* De ces deux dispositions ressort évidemment, suivant les Intimés, l'intention du législateur d'accorder au conseil de la cité de Québec, le pouvoir d'imposer un droit ou taxe sur les compagnies d'assurance et leurs agents dans la cité de Québec. Jusque là, point de difficultés, mais de quelles assurances le législateur veut-il parler? Est-ce de toute assurance provinciale ou étrangère et ses agents faisant affaire dans la cité de Québec, ou seulement, des compagnies d'assurance fondées en la cité, y ayant leur principal établissement, et aussi leurs agents ou agences dans cette même cité? Telle est la question soumise à la décision de cette Cour. Il semble aux Intimés, que le simple raisonnement suffit pour décider cette question. Les Intimés prétendent donc que les mots "dans la Cité de Québec" ne sont pas limitatifs aux compagnies d'assurances fondées à Québec, et y ayant leur principal établissement, mais s'appliquent, sans distinction, à toute compagnie d'assurance, ou à toute agence, ou à tout agent de toute compagnie, ayant son principal établissement, ou seulement une succursale ou agence en la cité de Québec, et y faisant affaire. C'est le sens naturel, d'après les Intimés, que présentent les dispositions des actes suscités. Autrement la disposition de la section 6, du chapitre 63, 22 Victoria, ne recevrait qu'une application très limitée, et que le législateur n'a pu avoir en vue en décrétant cette loi; car il n'est pas d'usage que les compagnies d'assurances ou autres compagnies de cette nature aient des agences, des succursales, des branches dans le lieu même où se trouve leur principal établissement. Ainsi la banque de Québec, l'assurance de Québec, ont bien des succursales, des agences à Montréal, à Trois-Rivières, etc., mais non pas, que les Intimés sachent, en la cité de Québec. Tout le monde sait que par

succursales, agences, branches, on entend un établissement fait par une compagnie ou société dans une localité distincte et plus ou moins éloignée du lieu où cette compagnie ou société a son principal établissement ; et la raison en est évidente, c'est que par suite de l'éloignement du lieu où se trouve le siége d'une telle compagnie, il serait difficile de faire affaire avec cette compagnie. On comprend que sans une agence de la compagnie d'assurance de Québec contre le feu établie à Montréal, il serait très incommode à un citoyen de Montréal désireux de faire assurer sa propriété par cette compagnie, de le faire directement au bureau principal à Québec. Au contraire, les Intimés ne voient pas la nécessité, ni l'utilité de la part de l'assurance de Québec d'établir un ou plusieurs agents en la cité de Québec ; et c'est parce que cette utilité n'existe pas qu'il n'y a pas de succursales de cette assurance en cette Cité. Si donc on adoptait l'interprétation de l'Appelant, on donnerait aux dispositions législatives citées plus haut, une interprétation contraire à la raison, à l'usage, à la signification juridique des mots *agent* et *agences*, au sens naturel de ces dispositions même et on attribuerait au législateur l'intention d'avoir voulu donner à ces dispositions un sens en désaccord avec la raison, l'usage et la signification même des mots dont il s'est servi. Quel est le but de ces dispositions ? si ce n'est de donner à la cité de Québec une augmentation de revenus, au moyen de droits ou taxes imposés sur les nombreuses compagnies d'assurance qui existaient en la cité de Québec, surtout lors de la passation de l'acte 22 Victoria, chap. 63. Or, d'après l'interprétation de l'Appelant, cette augmentation serait presque nulle, puisqu'elle ne frapperait que sur les compagnies d'assurance fondées ou ayant leur principal établissement en la cité de Québec, c'est-à-dire, sur la seule assurance de Québec, puisqu'il n'en existe pas d'autres fondées en cette cité. On doit donc raisonnablement présumer que le législateur a voulu aussi atteindre, par la loi ci-dessus citée, toutes les compagnies d'assurance faisant affaires dans la cité de Québec. Autrement les Intimés ne peuvent voir la raison d'être de ces dispositions, ni le but du législateur, et encore moins la nécessité de l'amendement formulé par la section 6 de l'acte 22 Victoria. D'après l'interprétation de l'Appelant, il s'ensuivrait que l'intention du législateur a été de favoriser les compagnies d'assurance étrangères dans notre cité, en leur conférant l'exemption de la taxe qu'il permet d'imposer sur les compagnies fondées en cette cité ; en d'autres termes, ce serait accorder aux compagnies étrangères une prime d'encouragement à venir faire à nos propres compagnies une compétition dangereuse, sinon ruineuse. Or, les Intimés nient que telle ait été l'intention du législateur. Au reste, il est un principe certain et

admis de tous, c'est que, dans l'interprétation des lois, il faut donner à toute disposition qui offre quelqu'obscurité ou ambiguité, le sens le plus conforme à l'usage ordinaire, le plus conforme à l'intention du législateur, et le plus propre à donner à cette disposition un plein et entier effet. Or, à l'époque où le statut 22 Victoria, chap. 63, a été passé, il n'apparaît pas en cette cause que les compagnies d'assurance fondées ou créées en la cité de Québec aient eu des agents ou des agences en cette cité. Le législateur n'a donc pu avoir en vue ces agences comme le prétend l'Appelant. Si la loi décrète pour l'avenir, il ne faut pas oublier que ces décrets ont presque toujours pour objet des nécessités, des besoins, des exigences du moment, qui préoccupent plus le législateur que les exigences ou les besoins futurs.

MONDELET, Justice : It is plain that the judgment appealed from, must be reversed. 1. The by-law in question purports to have been passed, on the 29 April, 1859. The act of the legislature authorizing the enactment of such by-law is of the 4th May ensuing. The by-law is, consequently, null and void. It cannot, for a moment, be seriously pretended that this by-law was passed on the 10th of May, this latter date being that at which the meeting of the 20th April, was adjourned, the by-law being *expressis verbis :* (At a special meeting of the council of the city of Quebec held at the City Hall, in the said city, on Friday, the 29th day of the month of April, and adjourned from that day to Tuesday the 10th day of May, and it is ordained and passed on the 29 April, &c.) 2. I am, as I was, when, on the 30th April, 1859, in the Superior Court, at Montreal, (1) I decided it in the case of the Corporation of Montreal and Wood, of opinion, that the law does not confer on the corporation the power to impose a duty on the agents of Foreign Insurance Companies, in the city, doing business therein, and consequently that any by-law affecting to impose such duty, is null and void. In the Montreal case, the Recorder had declared the by-law to be a nullity, and I confirmed his judgment. (2) In the present case, the Recorder of Quebec has condemned Appellant, and his judgment should be reversed. (3) It is useless to add that we have nothing to do with the inconvenience, if any, resulting from our decision, which is predicated upon the law *such as it is.*

DRUMMOND, Justice : The first question which arises in this case is whether the Corporation of the City of Quebec are authorized to pass a by-law, or by-laws, to impose a tax or

(1) *Cité de Montréal* et *Wood*, 3 Juriste, p 230.

(2) 14 and 15 Vict., cap. 128.

(3) 22d Vict., cap. 63, sec. 6, 4th May, 1859.

duty upon agents of Insurance Companies organized in other places, or whose chief-offices are established beyond the jurisdiction of the Corporation of Quebec? I have no hesitation in saying that the Corporation of the City of Quebec has possessed that power since the passing of the 22nd Vict., ch. 63, (which became law on the 4th May, 1859,) as appears by the manifest intention of the Legislature, as well as by the context of the following enactment, which forms part of the 6th section of that statute: "On all *agents* of or for any Insurance Com-" pany or Companies in the said city, and all premises occupied " by *such Insurance agent or agents*, of or for any such Com-" pany or Companies in the said city." The second question is whether, at the time the by-law was passed, for amongst other purposes imposing a tax of £125 upon the various classes of Insurance Companies therein specified, and the agencies of such companies, the Corporation of the City of Quebec was invested by the Legislature with power to enact it? or, in other words, was the by-law in question passed before or after the promulgation of the statute 22d Vict., ch. 63? The by-law does not show that it was passed after the time when the Legislature had invested the Corporation with the power to tax the agencies of those Insurance Companies which may be designated under the name of Foreign Companies, as being beyond the jurisdiction of the corporation. On the contrary, by the wording of the preamble of the by-law, it would seem, in a strict construction of its terms, that it had been passed on the 29th day of April, 1859, (when the corporation had no power to impose any such tax) at a meeting which was afterward adjourned to the tenth day of May of the same year. I am, therefore, of opinion that the by-law under consideration, in so far as it concerns the agencies of the various Insurance Companies therein specified, is null and void, and that the judgment of the Recorder should be reversed with costs in both courts.

JUDGMENT: The Court, seeing that the tax or duty sought to be recovered by the action of Respondents, is claimed by them under and by virtue of a by-law of the Council of the city of Quebec, passed at a meeting of the Council, held on the twenty-ninth day of April, 1859, and adjourned to the tenth day of May, 1859; seeing that the statute, under which alone the city Council have power to impose a tax or duty as that sought to be recovered by the action of Respondents was passed and received the royal assent on the 4th May, 1859; seeing, therefore, that it does not appear that the by-law was passed by the city Council, at a time when the city Council had power to impose the said tax or duty; and, therefore, that, in the judgment of the Court below maintaining the

demand of Respondents for the said tax or duty, there is error; doth, in consequence, reverse the judgment rendered by the Recorder, on the 19th day of September, 1862, and, proceeding to render the judgment which the Recorder ought to have rendered in the premises, doth dismiss the action and demand of Respondents against Appellant, with costs. (15 *D. T. B. C.*, p. 116.)

HOLT and IRVINE, for Appellant.

BAILLARGÉ, for Respondents.

PROCES PAR JURY.

BANC DE LA REINE, EN APPEL, Québec, 16 septembre 1864.

Présents : DUVAL, Juge-en-Chef, MEREDITH, MONDELET, DRUMMOND et BADGLEY, Juges.

EVANTUREL, Appelant, *et* WITHAL, Intimé.

Jugé : 1° Que, dans le cas de poursuite sur billets à ordre, souscrits et endossés alternativement d'individus négociants et d'individus non négociants, il sera loisible à aucune des parties au procès d'avoir et obtenir un procès et un verdict par jury. (1)

2° Qu'en pareil cas le tribunal saisi du procès, quoique les Défendeurs aient scindé leurs défenses, pourra ordonner que toutes les issues soient soumises à un seul et même jury.

L'action était pour le recouvrement de $645.60, montant de deux billets promissoires. Elle était dirigée contre Jean-Baptiste Rolland et fils, comme faiseurs, Joseph et Octave Crémazie, Jacques Crémazie, l'Honorable François Evanturel et l'Honorable Joseph Cauchon, endosseurs. L'intimé procéda en Cour Inférieure par défaut contre Joseph et Octave Crémazie; les autres endosseurs et les faiseurs avaient, chacun séparément, opposé à la demande une défense au fond en fait, soutenue d'affidavits où ils déposaient que les signatures alléguées être les leurs étaient fausses. Contestation fut liée séparément avec chacun d'eux par le Demandeur, l'Intimé, qui demanda et obtint que les faits de la cause fussent soumis à la décision et au verdict d'un jury. La Cour, donnant acte au Demandeur de la déclaration contenue en ses motions de ce qu'il faisait option d'un procès par jury sur chacunes des issues parfaites entre le Demandeur et les Défendeurs, ordonna par jugement du 4 avril, 1863, " qu'il y ait procès par " jury en la présente cause, mais ordonne qu'il n'y ait qu'un

(1) V. art. 348 C. P. C.

" seul procès sur toutes les issues levées en cette cause de la " part des différents Défendeurs en icelle." Subséquemment, l'Appelant fit motion pour que l'option faite par l'Intimé d'un procès par jury fût considéré comme non-avenue, et ce pour les raisons suivantes : 1. " Parce que la promesse, convention ou " contrat sur lesquels l'Appelant était poursuivi n'était pas, " quant à lui, d'une nature mercantile, l'Appelant n'étant pas " marchand ; 2. Parce que la contestation liée entre l'Appelant " n'était pas d'une nature mercantile ; 3. Parce que les ma- " tières de fait sur la contestation entre le Demandeur et l'Ap- " pelant n'étaient pas, quant à ce dernier, de celles qui, par la " loi, peuvent être soumises à la décision et verdict d'un jury." Après audition sur ces motions, elles furent renvoyées, avec dépens, par jugement rendu le 3 juin, 1863. C'était de ce jugement ainsi que de celui du 4 avril que l'Appelant interjeta appel.

CASAULT, pour l'Appelant : Le procès par jury est un tribunal exceptionnel dont la juridiction, comme celles de toutes ces sortes de tribunaux, doit être restreinte à ses limites les plus étroites. Chaque fois qu'il y a doute, la partie que l'on veut y traduire doit être renvoyée devant ses juges ordinaires. Sa juridiction est personnelle et réelle tout à la fois ; il faut que l'une des parties soit marchand, et que la cause de la demande soit d'une nature mercantile : il ne suffirait pas que les deux parties fussent commerçants, si le sujet de la contestation était étranger au commerce. Dans la présente cause, le Demandeur est marchand, mais l'Appelant soutient que, ni la dette, ni le contrat, la promesse ou la convention qui l'ont créée, ne sont, quant à lui, d'une nature mercantile. La déclaration allègue que l'Appelant a reçu les billets y mentionnés d'un homme qui n'était pas marchand, M. Jacques Crémazie, et les a cédés à une autre personne étrangère au commerce, l'Honorable Joseph Cauchon ; comment peut-on dire que ces transactions sont d'une nature commerciale ou mercantile ? L'endosseur n'est pas une caution, son contrat est indépendant, distinct et séparé de celui du faiseur, et subsiste lors même que ce dernier n'aurait contracté aucune obligation. Le billet promissoire n'a jamais été considéré comme effet de commerce, ce n'est que la reconnaissance d'une dette, et la promesse de la payer. Le non commerçant, porteur de cette reconnaissance, qui la cède ou vend à une autre personne, cette dernière fût-elle marchand, ne fait pas acte de commerce. Cela a toujours été la jurisprudence constante en France, et notre statut en disant que dans ce cas la preuve sera faite suivant les règles du droit anglais, comme si toutes les parties au billet étaient marchands, indique suffisamment qu'elle a aussi toujours été celle du Bas-Canada.

FOURNIER, pour l'Intimé : La question soumise est celle de savoir si la poursuite est fondée sur une convention d'une nature mercantile et qui peut être soumise à la décision d'un jury. Par la section 26 du Chapitre 83 des Statuts Refondus du Bas-Canada, il est statué comme suit : " Toutes personnes " ayant des poursuites et actions civiles dans la cour Supé- " rieure, fondées sur dettes, promesses, contrats et conventions " d'une nature mercantile seulement, entre négociants, mar- " chands, commerçants et corporations faisant commerce, ré- " putés tels suivant la loi, ou entre négociants, marchands, " commerçants et corporations, et des personnes non-engagées " dans le commerce, pourront, à l'option de l'une ou l'autre des " parties, avoir et obtenir un procès et un verdict par jury." L'Intimé maintient que, dans notre droit, tel que modifié par nos Statuts, l'endossement par un non commerçant, d'un billet souscrit par un marchand et pour les fins de son commerce, est une transaction d'une nature mercantile. La preuve dans toutes matières concernant ces billets doit être régie par les lois de l'Angleterre. (1) Mais l'Appelant lui-même admet que la convention alléguée par l'Intimé, en autant qu'elle concerne les faiseurs du billet, savoir : J. B. Rolland et fils, et J. et O. Crémazie, était d'une nature commerciale. Ainsi, quant à ces Défendeurs, il n'y a nul doute, d'après l'aveu même de l'Appelant, que l'Intimé avait le droit à l'option d'un procès par jury. En admettant même qu'en endossant le billet d'un marchand, l'Appelant n'aurait point fait un contrat d'une nature mercantile, l'indivisibilité de la transaction aurait encore l'effet de donner à l'Intimé le droit d'obtenir un procès par jury. Le fait d'être partie à un acte d'un caractère commercial, quant à quelques-unes des parties, doit avoir comme conséquence nécessaire de rendre les non-commerçants justiciables du même tribunal, et sujet au même mode de procédure. Dans une même cause, il ne peut y avoir deux modes différents de procéder, suivant les qualités des parties, et la même cause ne peut être décidée par un juge à l'égard de quelques Défendeurs, et par un jury quant aux autres. Ce principe est admis en France ; et les non-commerçants qui endossent les billets de commerçants, sont justiciables des tribunaux de commerce. Il suffira de citer l'autorité de Merlin, qui, d'ailleurs, est conforme à tous les auteurs qui ont écrit sur ce sujet. " Quand le " billet à ordre sera souscrit alternativement d'individus né- " gociants et d'individus non négociants, tous les signataires " indistinctement, en cas de contestation, ressortiront des tri- " bunaux de commerce, qui prononceront contre les uns la " contrainte par corps, et ordonneront sur les autres l'exécu-

(1) Stat. Ref. B. C., chap. 64, sec. 30.

" tion mobilière. Il fallait donner à la même autorité le droit " de rendre ces deux espèces de jugement, sur une matière " *indivisible de sa nature*; et comme, dans les causes mixtes, " c'est l'objet le plus grave qui entraîne celui qui l'est moins, " il était juste de déférer aux tribunaux de commerce la con- " naissance de ce genre de différends." (1) Jugement confirmé: Considering that, in the rendering of the judgments of the Court below rendered by the Superior Court, sitting at Quebec, on the 4th day of April, and on the 3d day of June, 1863, there is no error, doth confirm the said judgments. (15 *D. T. B. C.*, p. 126.)

CASAULT, LANGLOIS et ANGERS, pour l'Appelant.

FOURNIER et GLEASON, pour l'Intimé.

POURSUITE MAL FONDEE.—DOMMAGE.

CIRCUIT COURT, Québec, 21 janvier 1865.

Before TASCHEREAU, Justice.

CAYER, Plaintiff, *vs.* LABRECQUE, Defendant.

Jugé: 1o. Qu'un Demandeur de bonne foi, qui ne réussit pas dans son action, ne sera pas tenu d'indemniser le Défendeur pour le temps qu'il a perdu et les dépenses qu'il a encourues, en comparaissant devant la Cour pour faire valoir sa défense.

2o Que les frais d'action sont seuls la pénalité infligée sur un Demandeur de bonne foi, qui faillit dans son action. (2)

TASCHEREAU, Justice: Plaintiff claims $6.00, as an indemnity for loss of time and necessary expenses incurred by him in coming before the court to defend an action brought by Defendant against him, to which action he should not have been made a party, never having had any dealings with Defendant, and being in no wise indebted to him. In the original action, it was proved that a person, bearing the same name as the present Plaintiff, was indebted to the present Defendant and that, by error, the action had been served upon the present Plaintiff. There was, therefore, evidently no intention on the part of Labrecque to vex or annoy Plaintiff, and, unless this intention be clearly proved, no damages will be awarded in favor of a man summoned for a debt he does not owe. The costs are the penalty of a Plaintiff failing in his suit; and the

(1) 8 Merlin, Rep., vbo. Ordre, p. 833.

(2) V. art. 1053 C. C.

costs are the only penalty which this court will grant, when a Plaintiff in good faith is nonsuited.

JUDGMNET: Action dismissed, with costs. (15 *D. T. B. C.*, p. 130.)

LANGEVIN, for Plaintiff.

LÉGARÉ and MALOUIN, for Defendant.

ARRERAGES DE RENTE VIAGERE.—ENREGISTREMENT.

SUPERIOR COURT, Montreal, 30th November, 1864.

Before BADGLEY, Justice.

DESJARDINS, Plaintiff, *vs.* PROVOST, Defendant.

Jugé : Que, dans le cas d'une rente viagère créée en vertu d'une donation du 3 mai, enregistrée le 5 mai 1843, le donateur ne peut, en raison de la 37 sec., sous-sec. 2, stat. ref. Bas-Canada, ch. 37, réclamer hypothécairement des arrérages au-delà de cinq ans, et l'année courante, sans enregistrement d'un sommaire pour tels arrérages.

This was an hypothecary action brought by Plaintiff, as universal legatee, under the will of Joseph Deschambault, her late husband, of date the 21st June, 1851, registered 24th August, 1855, and set out a notarial *acte* of donation and cession, of the 3rd May, 1843, registered 5th May, 1843, from the testator to Louis Monciaux dit Désormeau, of 1,600 *livres*, old currency, the latter thereby agreeing to pay the testator, and his wife, the Plaintiff, a *rente et pension viagère* of 224 *livres*, yearly, until the death of the survivor, *sans diminution*, and hypothecating for the payment of the rent, two farms, of one of which Defendant was alleged to be the *détenteur*, and that there was due to Plaintiff ten years of *moitié de ladite rente*, 1,120 *livres* ($186.66.) Conclusion as in an hypothecary action for $186.66. Plea, that Defendant had not alleged any registration of the arrears of the five first years, and, therefore, could only recover $93.33, one half of the sum demanded, for which sum he offered to confess judgment, with costs, as in action under $100. Conclusion praying *acte* of his offer to confess judgment, and that he be condemned to costs only as in an action under $100, and for costs against Plaintiff in case the offer to confess judgment was not accepted.

BADGLEY, Justice, referred to the registry law, Con. Stat. of L. C., chap. 37, secs. 37, 38, and that, under sub-section two, of section 38, arrears of debt of a certain description, including alimentary pensions, were preserved by registration for five years, and the then current year, but for no longer

period. In this case, there was a tender made, and judgment would be given for the amount of the tender. JUDGMENT: The Court considering that the lot of land and premises described and mentioned in Plaintiff's declaration were hypothecated, under and by virtue of the deed of *création* of the said life rent, executed on the 3rd day of May, 1843, before Filiatreault and colleague, Notaries Public, and duly engistered on the fifth of the said month of May, for the security of the *rente:* Considering that Defendant, at the time of the institution of the present action, was the proprietor and *détenteur* of the lot of land and premises, hypothecated as aforesaid: Considering that no registration of arrears of the life rent has been alleged in Plaintiff's declaration nor established of record: Considering that Plaintiff, as the universal legatee of her late husband, Joseph Deschambault, who originally established the life rent, and who died in 1855, cannot, by-law, without such enregistration effected of said arrears due, have or demand the arrears claimed by her: Considering, however, that Defendant has, by his plea, offered to confess judgment in Plaintiff's favor for one half of the amount demanded by her of the said arrears, to wit, for the sum of $93.33, with costs against her upon her contestation of his offer: Considering that Plaintiff hath in fact raised such contestation; doth condemn Defendant to pay to Plaintiff the sum of $93.33, with interest thereon from the 16th day of May, 1864, date of service of process and costs up to the filing of the plea, as of a suit under $100, with costs against Plaintiff in Defendant's favor, of the said contestation. (15 *D. T. B. C.*, p. 132.)

JETTÉ and LESAGE, for plaintiff.

DOUTRE and DOUTRE, for Defendant.

CAUTIONNEMENT POUR FRAIS.

SUPERIOR COURT, Québec, 4 février 1865.

Before STUART, Justice.

GRAINGER *et al.*, Plaintiffs, *vs.* PARKE, Defendant.

Jugé: 1° Que, sur le décès d'une partie qui s'est portée caution pour frais, le Défendeur a droit d'obtenir un nouveau cautionnement. (1)

2° Qu'aucun abandon de ce droit de la part du Défendeur ne peut être réclamé, avant qu'il n'ait été informé du décès de la caution, par dénonciation de tel décès, de la manière ordinaire.

(1) V. art. 29 C. C.

This case was submitted to the consideration of the court upon a motion for the renewal of security for costs. The Plaintiffs, residents of Great Britain, had, at the commencement of the action, given the security for costs required of non residents in Canada. James Foster Bradshaw, Plaintiff's surety, died in the month of July, 1863. Subsequently to the death of Bradshaw, proceedings in the cause had been taken by both parties, and several interlocutory judgments had been rendered. On the first of February, 1865, Defendant having become aware of the death of Bradshaw, moved for a renewal of security for the costs of the action, accompanying his motion by the certificate of the death of Bradshaw. AUSTIN, for Plaintiffs, urged that this motion could not be granted, firstly, on the ground that the heirs of Bradshaw, being equally liable with himself, the security still subsisted, and no renewal of security was necessary or could be demanded; and, secondly, that, if any such right did exist on the part of Defendant, it had been waived by lapse of time, over eighteen months having passed since the death of Bradshaw, and by Defendant allowing various proceedings to take place, and interlocutory judgments to be rendered, without having moved for other security. In support of this view, the court was referred to the case of Supple and Kennedy (1) in which it was held: " That irregularities in themselves fatal, are waived if " uncomplained of for a year." Now, the omission on the part of Plaintiff to put in new security, if an irregularity at all, had been waived, the party giving the security having been dead for nearly two years, several proceedings having been taken, and no less than three interlocutory judgments having been rendered. Defendant, therefore, could not now claim to have the security renewed or the irregularity rectified. COOK, W., for Defendant, argued, that there could be no doubt as to the right of demanding a renewal of the security, for it was a principle clearly laid down by all the french writers, and followed by the courts here, that upon the death of a surety, another one could be demanded: " Si la caution " avait les qualités lorsqu'elle a été reçue,mais qu'elle ait cessé " depuis de les avoir, le débiteur sera-t-il obligé d'en donner " une autre. Il faut distinguer, il y sera obligé si c'est une caution légale ou judiciaire. (2) La cour a jugé par un arrêt " rendu le 16 avril, 1734, qu'une caution *judicatum solvi* " étant décédée, on pouvait en demander une nouvelle." (3) That, as to the waiver of the right to demand a renewal of

(1) 8 R. J. R. Q., p. 464.

(2) Pothier, *Traité des Obligations*, No. 392.

(3) Ancien Denizart, vbo. *Cautio judicatum solvi*, paragraphe 16.

the security for costs, it could not be claimed or maintained because the fact of the death of Bradshaw had never been notified to Defendant, and that, therefore, he had never been *en demeure* to make the demand which he now did by his motion. That he had the right to security for costs was undoubted, and he should not be deprived of this right by anything that might occur without his knowledge.

STUART, Justice: This is a motion for the renewal of security for costs. There can be no doubt as to the existence of this right. It is a privilege by law conferred upon Defendants against non resident Plaintiffs. The time within which the application must be made is only limited by law when the Plaintiff describes himself in the declaration as a non resident, but, in the case of the Defendant's becoming entitled to this security by any subsequent event in the cause, no limit is fixed within which the application must be made. I do not see that, even if Defendant had been made aware of the death of the party giving the security, the time to demand a renewal could be limited, the proper course for Plaintiff to have pursued was to have renewed the security without any demand on the part of Defendant. The motion must therefore be made absolute.

Judgment: Motion made absolute. (15 *D. T. B. C.*, p. 134.)

AUSTIN, for Plaintiff.

GOWEN and LLOYD, for Defendant.

COOK, Counsel.

HYPOTHEQUE LEGALE DE LA FEMME.—OBLIGATION DE LA FEMME MARIEE POUR SON MARI.

COUR SUPÉRIEURE, Montréal, 1 décembre 1864.

Coram SMITH, J.

ARMSTRONG *vs.* ROLSTON, Cur., *et* DUFRESNAY, Opposante, *et* THE TRUST and LOAN COMPANY OF UPPER CANADA, Contestants.

Jugé : 1° Que, par les dispositions de la 29me clause du chapitre 30 de la 4me Victoria, aucune hypothèque légale ou tacite ne subsiste sur les propriétés du mari pour le remploi des propres de la femme aliénés durant le mariage. St. Ref. B. C., Ch. 37, Sec. 51. (1)

2° Que la renonciation de la femme à l'exercice de ses droits et reprises, en faveur d'un créancier de son mari, n'est pas un cautionnement, et en conséquence, telle renonciation est valable. (2)

(1) V. art. 2029 C. C.

(2) V. art. 1301 C. C.

L'immeuble saisi et vendu sur le Défendeur Louis Boucher était un propre de communauté appartenant à ce dernier qui l'avait acquis de Sarah Taylor, le 24 avril, 1847, J. Belle, N.P. L'Opposante Marie A. Dufresnay, l'épouse du Défendeur, avait obtenu une séparation de biens d'avec Louis Boucher, son mari, le 19 février, 1863,et par un rapport du patricien homologué le 30 juin, 1863, ses droits et reprises furent constatés comme suit : 1° Pour remploi du prix d'un terrain vendu l'un de ses propres de communauté, £900 ; 2° Pour remploi du prix du terrain en deuxième lieu décrit, aussi un autre propre de communauté vendu, £500 ; total £1,400. Elle prétendait exercer sur l'immeuble saisi et vendu une hypothèque et un privilège avant tous autres créanciers et remontant à la date de son mariage, le 21 novembre 1864, et, par son opposition à fin de conserver, elle réclamait la somme de £1,422 0 5, avec intérêt sur £1,400 du 19 février, 1863, étant £1,400 pour remploi de propres, et £22 0 5, pour frais taxés sur son jugement en séparation. La Compagnie de Trust & Loan, qui avait fait une opposition à fin de conserver pour la somme de $2,400, montant d'une obligation consentie par le Défendeur, le 26 août, 1846, Doucet, N. P., et enrégistrée le 27 août, 1856, et hypothéquant l'immeuble saisi et vendu, contesta cette opposition. L'Opposante, Dame Dufresnay, avait fait une renonciation le 28 août, 1856, devant Chalut, N. P., dans les termes suivants : " Et, pour assurer, autant que faire se peut, la garantie donnée à ladite compagnie, pour le paiement de ladite somme et intérêt suivant les termes mentionnés en ladite obligation, a, par ces présentes, tant en son nom qu'au nom des enfants, nés et à naître de son mariage avec son époux, renoncé en faveur de la compagnie à son douaire coutumier, avantages et réclamations qu'elle peut ou pourrait avoir par son mariage sur l'immeuble mentionné dans ladite obligation." La compagnie Opposante, en contestant l'opposition de Dame Dufresnay, allégua spécialement : "That, by the " laws of this Province, no legal or tacit hypothec subsists " on the real estate of married men, for securing the repay- " ment to their wives of the price of the *propre* estate owned " and possessed by them at the time of their marriage, and " afterwards sold during coverture (*remploi de propre*). That " the *propres* of Marie Angélique Dufresnay, alleged in her " opposition to have been sold during her coverture, and of " which she claims the price (*remploi de propre*) were owned " and possessed by her at the time of her marriage with Bou- " cher, and that she consequently never had a legal or tacit " hypothec for the repayment of their price on the immovable " property of her husband, Boucher, which was adjudged and " sold by the sheriff of the district of Richelieu and of which the

" proceeds are in his hands awaiting the order of this Court. " That, even supposing Marie Angélique Dufresnay to have " had a legal or tacit hypothec, on the said immovable pro- " perty, for securing the restitution of the price of her propres, " it would now be extinguished by virtue of the said deed of " renunciation. That the two sales of which Marie Angélique " Dufresnay, claims the restitution of the price by her oppo- " sition, were made long after the execution and registration " of the deed of obligation hereinbefore recited granted by " Boucher, to the contesting parties; that, even supposing " Marie Angélique Dufresnay, to have a legal or tacit hypo- " thec, on the immoveable property adjudged and sold by the " sheriff of the district of Richelieu, it could only rank from " the date of the said sales, and, therefore, be subsequent and " posterior to the hypothec of the contesting parties." L'Opposante répondit : Que Marie Angélique Dufresnay, n'a pu, en loi, et n'a de fait renoncé, par et en vertu de l'acte de renonciation allégué par la compagnie de dépôt et de prêt du Haut-Canada avoir été faite par elle qu'au douaire coutumier qu'elle avait ou pourrait avoir sur l'immeuble vendu et non à tous avantages et réclamations qu'elle pouvait ou pourrait avoir, lui résultant de son mariage avec Boucher. Que, fût-il vrai qu'elle aurait, par ledit acte de renonciation, renoncé à tous autres avantages, droits et réclamations lui résultant du fait de son mariage avec Boucher, telle renonciation ne pourrait valoir en loi, vu qu'elle comporterait un avantage en faveur de son époux durant le mariage, et que tel avantage durant le mariage est réprouvé par la loi. Que ladite renonciation, en autant qu'elle pourrait être considérée comme affectant les droits de reprises, de Marie Angélique Dufresnay, pour remploi de ses propres aliénés, est nulle et de nul effet, et doit être déclarée telle comme comportant, de la part de la femme, un avantage en faveur de son mari, et même de la compagnie, réprouvé par la loi. Pourquoi Marie Angélique Dufresnay "conclut, à ce que la renonciation du vingt-six avril, 1856 alléguée dans la contestation de la compagnie de dépôt et de prêt du Haut-Canada, soit, en autant du moins qu'elle pourrait affecter les droits de reprises, soit hypothécaires, soit personnels de Marie Angélique Dufresnay, tant pour le remploi de ses propres aliénés pendant son mariage, que pour tous autres avantages et droits matrimoniaux, soit hypothécaires, soit personnels, lui résultant de son mariage, déclarée nulle et de nul effet ; à ce qu'il soit déclaré et adjugé que Marie Angélique Dufresnay avait sur ledit immeuble vendu, lors de la vente et adjudication qui en a été faite par le shériff, pour sûreté du paiement et remboursement de la somme par elle réclamée par sadite opposition, une hypo-

thèque remontant à la date de son mariage avec Boucher, et, partant, à ce qu'il soit ordonné qu'elle sera payée, sur et à même les deniers provenant de la vente dudit immeuble, et ce par préférence et avant ladite compagnie et, enfin, à ce que la contestation de ladite compagnie soit déboutée."

SMITH, J.: A question of some importance arises whether there is any protection to a married woman for the *remploi* of a *propre* that has been alienated by her husband, as she claims the *rapport* of that sum of money. There is no doubt that, under the common law, this right still existed. The question is, how has the registry law affected this right? The 29th sec., 4 Vic., chap. 30, declared that no tacit or legal *hypothèque* shall be constituted or subsist, upon the husband's property, except for securing the restitution and payment of the wife's claims, by reason of property devolving upon her during the marriage. This property then did not come to Madame Boucher during her marriage. It was property she possessed at the time of her marriage. She was then able to protect herself from the acts of her husband. But the property that came to her during the marriage was not under her control, and, accordingly, the law declared that such property should be protected by *hypothèque*. But there was another point in the case which was conclusive: the wife, after the separation of property, which took place, postponed her rights to the Trust and Loan Company. The question then came up, could a woman renounce to these rights? Undoubtedly she could. It was only postponing her rights till the debts of her husband have been paid. It has been so held in the Court of Appeals. The renunciation of the wife is a good one and the Trust and Loan Company must get the benefit of it. (1)

" The court, considering that Opposant, The Trust and Loan Company of Upper Canada, hath established its contestation of the opposition of Marie Angelique Dufresnay, seeking to

(1) Citations de la partie contestante: 1. No legal or tacit hypothec exists for the restitution of the price of the wife's *propre* estate sold during coverture: Con. Statutes, L.C., Ch. 37, S. 46; Con. Statutes, L.C. chap., 37, S. 8; Bonner's Essay, p. 61. Reason for this: Troplong, 2 Priv. and Hyp., p. 441. 2. A married woman can legally renounce her hypothec for matrimonial rights in favor of her husband's creditors: 6 Pandectes, traduites par Bréard-Neuville, p. 251; 1 Persil, Régime, Hyp., p. 305; 1 Persil, Priv. and Hyp., p. 253; 2 Troplong, Priv. and Hyp., p. 482; 13 Toullier, No. 122; 3. The Renunciation need not be express; 2 Domat, Tit. 1, sec. 7, Nos. 12 and 13; 1 Persil, Priv. and Hyp., p. 257; 2 Troplong, Priv. and Hyp., pp. 475 and 483. 4. The Renunciation of her hypothec is not an indirect advantage, since the personal liability remains. 5. The legal hypothec of the married woman is not exempt from registration: Con. Statutes, L. C., ch. 37, S. 1; Con. Statutes L. C., chap. 37, S. 30; *Girard* vs. *Blais*, et Divers Opposants, *suprà*, p. 353; 6 R.J.R.Q., p. 386, *La Reine* vs. *Comte et al.*, et *suprà*, p. 353.

be collocated, by special mortgage, from the day of the date of her marriage with Louis Boucher, and that, by reason of the 29th clause of 4th Vict., chap. 30, no tacit or legal hypotheque can exist on the property of Boucher, the property, accruing to Marie Angélique Dufresnay, having accrued to her before her marriage with Boucher. And, further, seeing that Marie Angélique Dufresnay, by deed of renunciation, executed before Chalut and his colleague, notaries, and bearing date the 26th day of August, 1856, did relinquish and postpone her right of mortgage to that of The Trust and Loan Company, by reason of which renunciation, all rights of mortgage accruing to Marie Angélique Dufresnay became postponed to that of The Trust and Loan Company : doth maintain the contestation of The Trust and Loan Company of Upper Canada and doth order, in the distribution of the moneys of Defendant, that The Trust and Loan Company be collocated in preference to Marie Angélique Dufresnay." (9 *J*., p. 16.)

BELANGER et DESNOYERS, avocats de l'Opposante Dufresnay.

HENRY JUDAH, avocat de The Trust and Loan Company, partie contestante.

SAISIE-ARRET APRES JUGEMENT.

COUR SUPERIEURE, Montréal, 19th November, 1864.

Coram BERTHELOT, Justice.

KINGSTON *vs.* TORRANCE, *and* TORRANCE *et al.*, T. S., *and* KINGSTON, contesting.

Held : A Defendant foreclosed from pleading to a writ of *saisie-arrêt* after judgment, will, on special motion, be allowed to answer the Plaintiff's contestation of a *tiers-saisis* declaration made in obedience to such writ, if he has an interest in the matters raised by the contest.

In obedience to the writ of *saisie-arrêt* issued after judgment, the *tiers-saisis*, executors to the will of Defendant's father, declared that they had, at the time of the service upon them of the writ, a sum of £2250, being the amount of a legacy coming to Defendant under his father's will, on his attaining the age of thirty years. That the said sum had, a long time previous to this action, been assigned, by marriage contract, to trustees for the benefit of Defendants' wife. That, under these circumstances, they were unable to decide to whom the said sum belonged. The Plaintiff contested this declaration, saying that, according to the terms of his father's will, Defen-

dant had no power to assign the said sum at the time he made the assignment. The *tiers-saisis* answered, denying the allegations of Plaintiff's contestation. The Defendant, who had been foreclosed from pleading to the writ of *saisie-arrêt*, moved to be allowed to file the following special answers to Plaintiff's contestation: "That the assignment by Defendant to the trustees mentioned in the declaration of the *tiers-saisis* of the sum of £2250 was so made by indenture of marriage then intended to be, and shortly after the execution thereof, duly had and solemnized; and, upon such solemnization, immediately arose and took effect, and became binding on all parties thereto, for a valuable consideration, to wit, the marriage, and settlement in life of Defendant. That the said legacy of £2250 was absolutely the property of Defendant, at the time of the assignment, and, by the terms of said will, he was not restricted or hindered from the ownership, enjoyment, and assignment of the said legacy, unless the executors of the will saw fit so to restrict him, which in point of fact, they never did, but, on the contrary, when notified of the same, recognized its force and validity, and paid over the interest on the said legacy unto the trustees of the settlement, from time to time, and, by so doing, recognized and ratified said assignment, and waived their power to exercise said restriction, and did not, at the time of the seizure hold the legacy in for Defendant, but for the said trustees." The Plaintiff objecting to the filing of Defendant's answer contended that Defendant had no interest in joining issue in the cause. According to his own statement, his interest in the money had ceased, and if he had no interest he could not be injured by the contestation. The trustees to whom Defendant made the assignment might possibly intervene, but Defendant had nothing to do with the contest. On behalf of Defendant, it was argued that the results of the contestation, if successful, would be to nullify the assignment that he had made years before. He was doubtless then greatly interested in the result; he had a right to defend himself. It was his interest that the covenant he had made should he maintained.It was true that the parties to whom the assignment was made were greatly interested also, and might intervene in the cause, but that did not affect Defendant's position; his interest arose in a different way from that of the assignees. They were interested in retaining the money; he was interested in maintaining, his conveyant. If it were not maintained; he would be liable in damages to the assignees, so that, in reality, his interest was equal to theirs, although arising in a different way. The court, in giving judgment, remarked that Defendant had an interest,

and, consequently, a right to answer the contestation; and the motion should be granted. Motion granted (9 *J.*, p. 20.)

S. Bethune, Q. C., for Plaintiff.

Torrance and Morris, for Defendant and *tiers-saisis.*

SAISIE-ARRET APRES JUGEMENT.

Cour Supérieure, En Revision,

Montréal, 30 novembre 1865.

Présent : Badgley, J., Berthelot, J. et Monk, J.

Kingston *vs.* Torrance, *and* John Torrance *et al.*, Tiers-saisis, *et* Kingston, Contestant.

Jugé: Qu'un Tiers-Saisi qui paie au Défendeur, son créancier, les deniers qu'il a en mains au moment de la signification de la saisie-arrêt, est tenu de payer deux fois. (1)

Badgley, J.: This was a contestation of a declaration of garnishees. A judgment having been rendered against the Defendant, the Plaintiff attached the sum of £2,750 in the hands of the executors of his father's estate, this sum being left to Defendant by will, to be paid to him by the executors after he had attained the age of 30. The attachment took effect before the Defendant had attained the age of 30. At this time the executors had the £2750 in their hands, less the sum of £500 which they had paid out. Since the attachment was placed in their hands they had paid away the balance of £2,250. Now at the time they paid this money away, they were under the obligations of the law, because the Queen's writ had ordered them to hold it. There could be only one consequence of their having divested themselves of the money; they must be held liable for it. Under these circumstances the judgment of the court below must be confirmed. (1 *L. C. L. J.*, p. 108).

(1) Les faits de cette cause apparaissent ci-dessus, p. 465.

PEREMPTION D'INSTANCE.

SUPERIOR COURT, Montreal, 31st December, 1863.

Coram BERTHELOT, J.

BREWSTER *et al.* *vs.* CHILDS *et al.*

Jugé: That the death of one of the Plaintiffs interrupts the *péremption d'instance.* (1)

This was a motion by certain of the Defendants for *péremption d'instance.* On the return of the rule, LAFRENAYE, for Plaintiffs (showing cause) fyled a certificate of the death and burial of Brewster, one of the Plaintiffs, and prayed for the discharge of the rule.

PER CURIAM: On the authorities of An. Denisart, Vo. *Péremption*, p. 660, No. 12, and p. 661, No. 23; Pothier, *Proc. Civ.*, p. 77, ch. 4, §4, and 1 Pigeau, p. 357. I hold that the death of one of the Plaintiffs interrupted the *péremption*, and I therefore discharge the rule. Rule for *péremption* discharged. (9 *J.*, p. 21.)

P. R. LAFRENAYE, for Plaintiff.

STRACHAN BETHUNE, for Defendants.

PEREMPTION D'INSTANCE.

SUPERIOR COURT, Montreal, 31st December, 1863.

Coram BERTHELOT, J.

HOWARD *et al.* *vs.* CHILDS *et al.*

Held: That the death of one of the Defendants interrupts the *péremption d'instanee.*

This was a motion by Defendant for *péremption d'instance.* RITCHIE, showing cause for Plaintiffs, fyled a certificate of the death and burial of Noad, one of the Defendants, and prayed for the discharge of the rule.

PER CURIAM: In my opinion, the death of any party, in a cause, interrupts the *péremption.* I have already ruled so in the case No. 617, *The City Bank* vs. *Tate et al.*, and I concurred in the judgment which was rendered in *McKay* vs.

(1) V. art. 455 C. P. C.

Gerrard (1) I would also refer to Pothier, *Proc. Civ.*, p. 77, ch. 4, and An. Den., Vbo *Péremption*, p. 660, No. 12, and p. 661, No. 23. The rule must be discharged. Rule for *péremption* discharged. (9 *J.*, p. 22.)

ROSE and RITCHIE, for Plaintiffs.

A. and W. ROBERTSON, for Defendants.

JUGES DE PAIX.—JUGEMENT.

COUR SUPÉRIEURE, Montréal, 31 mai 1864.

Coram MONK, A. J.

ST. GEMMES, Appelant, *et* CHERRIER, Intimé,

Jugé : Que lorsque deux ou plusieurs juges de paix ont instruit une cause, ils doivent tous concourir pour la juger.

Cherrier ayant poursuivi l'Appelant devant les juges de paix, pour dommages causés par des animaux, et l'Appelant ayant été condamné, (Acte d'Agriculture, Stat. Ref. du B. C., ch. 26), il en appela à la Cour de Circuit, en vertu de la 24ème Vict., ch. 30.

MONK, J. : Dans la cour inférieure, deux juges de paix siégeaient, lorsque la preuve a été faite, et l'un d'eux seulement a jugé la cause, l'autre s'étant abstenu, en conséquence d'une récusation dont il n'aurait pas dû s'occuper. Une cause, *ex parte* Robertson, jugée à Sherbrooke, en juillet, 1863, et rapportée dans l'ouvrage de Carter, *Law and Practise on summary convictions and orders*, p. 64, contient les motifs sur lesquels, je me fonde pour casser ce jugement. Il a été là décidé ce qui est résumé comme suit : If heard before two or more, they must all be present when they conclude and decide." L'autorité de Guyot, Répertoire, t. 9, vo. *jugement*, a été adoptée par le juge de Sherbrooke, et je l'adopte aussi. Elle décide que, " lorsqu'il y a plusieurs commissaires nommés pour décider une affaire, ils doivent tous assister au jugement, à moins que la commission ne porte qu'ils pourront juger en l'absence les uns des autres. Appel maintenu. (9 *J.*, p. 22.)

MAGLOIRE LANCTOT, pour l'Appelant.

DOUTRE et DOUTRE, pour l'Intimé.

(1) Le délai pour la *péremption*, après le décès de l'une des parties en cause, cesse de courir contre les héritiers pendant trois mois et quarante jours, qui leur sont accordés pour délibérer s'ils doivent accepter ou non la succession de la partie décédée. Le décès de la partie fait cesser le mandat du procureur, (*Mackay et al.* vs. *Gerrard et al.*, C. S., Montréal, 31 mai 1861, MONK, A. J., 9 R. J. R. Q., p. 354.)

AUTORISATION MARITALE.—DECRET.

Montréal, 25 janvier 1865.

Coram SMITH, J., BADGLEY, J., BERTHELOT, J., siégeant en Cour de Revision.

LES COMMISSAIRES D'ECOLE POUR LA MUNICIPALITÉ DE LA VILLE DE SOREL *vs.* CREBASSA, *et* WALKER, Adjudicataire, mis en cause.

Jugé: Que le dire du shérif, dans son rapport du writ *de terris*, que la femme séparée de biens, devenue adjudicataire, était autorisée par son mari alors présent, n'est point suffisant sans la production d'une autorisation écrite et précise. (1)

Le jugement de la Cour Supérieure, siégeant à Sorel, dans le district de Richelieu, a été rendu comme suit : " La cour, après avoir entendu la plaidoirie des avocats des Demandeurs, sur la règle par eux obtenue, pour contrainte par corps, contre l'adjudicataire Mary Walker, épouse séparée de biens du Défendeur, ladite adjudicataire ayant été appelée pour répondre à ladite règle, et ayant fait défaut, et avoir mûrement délibéré. Considérant que, quoique, suivant l'ancien droit commun de la France qui est celui de ce pays, les adjudicataires de biens vendus judiciairement fussent contraignables par corps d'en payer le prix, les femmes et les filles en étaient cependant exemptées, et que, de plus, dans la présente espèce, rien ne fait voir légalement que la mise en cause fût autorisée de son mari à se porter adjudicataire, le dire du Shérif, sans la production d'une autorisation écrite et précise, étant insuffisant pour constituer une preuve légale de ce fait, a déchargé et rejeté, et, décharge et rejette la règle pour contrainte par corps émanée contre l'adjudicataire mise en cause." Ce jugement ayant été porté en Cour de Revision à Montréal, les Demandeurs ont exposé les faits et le droit dans leurs moyens d'appel comme suit : 1o. Le 30 mai 1864, la mise en cause, Mary Walker, épouse séparée quant aux biens de John George Crebassa, " étant, " suivant le rapport du shérif sur le writ d'*alias venditioni exponas de terris*, " bien et dûment autorisée de sondit époux, qui à ce présent a déclaré l'autoriser pour le dit achat," est devenue adjudicataire, pour $2049, des cinq lots de terre là et alors vendus par le shérif sur le Défendeur. 2o. Elle a alors payé $117.18, pour les frais encourus antérieurement sur une folle enchère. 3o. Elle a toujours négligé de payer la balance, savoir $1931.82. 4o. Le 14 novembre, 1864, une règle fut prise et signifiée tant

(1) V. art. 177, C. C.

à Mary Walker, qu'à son mari, pour une contrainte par corps contre elle, pour la restitution de la somme de $730.82, étant la différence entre le montant de son enchère, et celui de la revente sur folle enchère, conformément aux dispositions de la section 25 du chapitre 85 des Statuts Refondus pour le Bas-Canada. 5o. Il est évident que la mise en cause qui a fait défaut, et n'a pas contesté la règle, a été régulièrement autorisée par son mari, lors du décret même, et en présence de l'officier public. 6o. Par le chapitre 87 des Statuts Refondus pour le Bas-Canada, section 7, au préambule, il est statué comme suit: " Et considérant qu'il est désirable d'adoucir la rigueur des " lois qui règlent les *relations* entre *débiteur* et *créancier* en " autant que peuvent le permettre les *intérêts du commerce:* " à ces causes, sauf toujours les dispositions prescrites dans la " section 24. . . . .et nulle personne du sexe ne sera arrêtée ni " admise à caution à raison d'*aucune dette,* ni à raison d'aucune " autre cause *d'action civile* ou *poursuite quelconque ;*" or, il est évident que les dispositions prescrites dans la section 24, s'appliquent tant aux femmes qu'aux hommes. 7o. Les dispositions de la 24e section, sont comme suit: " Rien dans le pré- " sent acte n'aura l'effet d'exempter de l'arrestation de l'em- " prisonnement *aucune personne*. . . .qui doit le prix d'achat " d'aucune terres,et ténéments, biens ou effets vendus et adjugés " par autorité de justice, par licitation, par le shérif, par décret " ou autrement." Ces dispositions statutaires, ont été appliquées à un cas en tout semblable à celui-ci, à Québec, en la cause de *McDonald* vs. *McLean,* (1). Le jugement de la Cour de Revision, repose sur le principe qu'il n'a pas été prouvé que la femme avait été autorisée par son mari à se porter adjudicataire. Ce jugement est comme suit: " The court, having heard the parties upon the judgment rendered in the Superior Court in the District of Richelieu,on the 19th November, 1864 ; considering that it has not been shewn nor established of record, that Mary Walker, the said *mise en cause,* was authorized by her husband, John George Crebassa, to become the adjudicataire of the several lots of land, mentioned in the return of the Sheriff of the District of Richelieu as having been by him adjudged to her; and, considering, therefore, that the rule for *contrainte par corps* against her, issued at the suit of Plaintiffs against her, as such *adjudicataire,* is contrary to law ; considering that, in the judgment rendered by the Superior Court, sitting in the District of Richelieu, sought to be raised by the proceedings in revision before this court,

(1) Une règle pour contrainte par corps contre une femme mariée, séparée de biens, doit être signifiée au mari, autrement elle sera rejetée par la cour. (*MacDonald* vs. *McLean,* et *Wilson,* Opposant, et *Doyle,* adjudicataire, C. S., Québec, TASCHEREAU, A. J., 9 *R. J. R. Q.*, p. 363.)

for the reason aforesaid, there is no error; doth, for the reasons above mentioned, maintain and confirm said judgment, with costs to the *mise en cause* against Plaintiffs in this court in revision. (1) (9 *J.*, p. 23.)

OLIVIER et ARMSTRONG, avocats des Demandeurs.

P. R. LAFRENAYE, conseil.

GIROUARD, avocat de l'adjudicataire.

SECURITY FOR COSTS.

CIRCUIT COURT, Montreal, 31st December, 1864.

Coram BADGLEY, J.

DAVIS *vs.* JACOBS.

Jugé: That where a Plaintiff has left the country subsequent to the institution of an action, security for costs may be demanded, although it be shown, by affidavits, that he has a place of business, containing valuable stock, and a domicile, in this city, and that his absence was believed would be temporary, namely about three months. (2)

In November last, Plaintiff, a merchant of, and then residing in Montreal, instituted an action against Defendant, also a resident of this city, on an account for goods sold and delivered. On 10th December, Defendant moved for security for costs, and fyled, in support of his motion, an affidavit, alleging that he had been informed that Plaintiff had, subsequent to the institution of the action, left for Europe. The Plaintiff resisted the application on the grounds that Plaintiff had still a dwelling house and a place of business in this city, that he possessed goods here of the value of $20,000, that he was still carrying on business here, and that he was only temporarily absent in Europe, for the purchase of goods, and was expected back in February next. He presented two affidavits, the one of which was made by a clerk, the other by the attorney *ad negotia* of Plaintiff's, in support of all these statements.

(1) Citations des Demandeurs : Différence entre les actes extra-judiciaires et les procédures. 1 vol., Rép. de Guyot, p. 829, vo. *autorisation*, sec. 5, §1-3 ; Arrêts du Parlement de Paris, rapportés par Brillon, vo. *autorisation*, No. 18, Ed. de 1727 ; Renusson, Com., partie 1ère, ch. 8, No. 12 : "Lorsque la "femme contracte en jugement conjointement avec son mari et donne quelque "consentement, elle n'a pas besoin d'être autorisée expressément de son "mari. Tout ce qui est nécessaire, c'est qu'il existe une preuve légale du consentement du mari." *Vide* Guyot, Rép., vo. *autorisation*, p. 820, 2 vol., 1er alinéa. Or le rapport du shérif est une preuve légale.

(2) V. art. 29 C. C.

PER CURIAM: The Defendant is entitled to the security. When Plaintiff returns to the country the securities will be discharged. Motion granted. (9 *J.*, p. 25.)

JOHN POPHAM, for Plaintiff.

H. J. CLARKE, for Defendant.

PARTNERSHIP.—EXECUTION.

CIRCUIT COURT, Montreal, 31st October, 1864.

Coram BERTHELOT, J.

RICHARDSON *vs.* THOMPSON, *and* THOMPSON *et al.*, Opposants.

Held: That where no fraud is proved, a judgment against an individual partner cannot be executed against property of the firm in which he is a partner. (1]

The opposition was fyled by the firm of Job C. Thompson & Co., who claimed to be the owners of the goods and chattels seized under Plaintiff's writ. The partnership was alleged to have been formed in January, 1863, and was composed of Defendant and Alexander Brown, who carried on business at Montreal, as hatters and furriers. The goods and chattels were seized in their store, and were alleged to form part of their stock. The Plaintiff contested the opposition on two grounds: 1st. That the debt for which the judgment had been rendered was contracted by the firm of C. Atkinson & Co., of which Defendant was a member; that, on the dissolution of said firm, in September, 1862, the whole of the assets, stock in trade, &c., were made over to Defendant, and the debts and liabilities of the concern assumed by him; and that the whole of the assets, stock, &c., were afterwards put into the partnership of Job C. Thompson & Co. formed in January following and that said assets were liable and bound for the debts of C. Atkinson & Co., and the Opposants, having taken possession of and benefited by them, were bound to pay said debts, even supposing the partnership to be in good faith. 2nd. that said partnership was in bad faith, and formed for the mere purpose of placing Defendant's property out of the reach of his creditors, Brown being a nominal partner, and having put nothing into the business. The Opposants produced their partnership deed, executed before notaries, and proved, at the *enquête*, that the goods were seized in the possession of the

(1) V. art. 546 C. P. C. et 1899 C. C.

firm and formed part of their stock in trade, that the old stock of C. Atkinson & Co., had been sold off, long before the seizure was made, with the exception of an iron safe, a letter press and a deer's head. The Plaintiff examined Opposant, Job C. Thompson, who stated that the firm of C. Atkinson & Co., at time of dissolution, was insolvent, that he only undertook to pay the debts specified in the schedule annexed to the deed of dissolution, in which Plaintiff's claim was not included, that he had since paid off more than the amount in value of the assets of the old firm, he also stated that Brown had put goods to the value of about £1,000 into the business.

BERTHELOT, J., in rendering judgment, said that no proof had been offered in support of the allegations of fraud. There was nothing to shew that Brown was aware of the existence of Plaintiff's claim at the time he entered into partnership with Defendant. If he had referred to the deed of dissolution of C. Atkinson & Co., he would have found nothing there to indicate that such a claim had ever existed. The opposition must, therefore, be maintained with costs, (1) (9 *J.*, p. 26.)

A. & W. ROBERTSON, for Plaintiff.

CROSS and LUNN, for Opposants.

SIGNIFICATION DE VENTE DE CREANCE.

COUR DE CIRCUIT, Québec, 24 décembre 1864.

Coram TASCHEREAU, J.

MIGNOT *vs.* REEDS.

Jugé : Qu'une action portée par le cessionnaire d'une créance, sans signification du transport ou sans acceptation par le débiteur, sera renvoyée avec dépens sur une défense en droit.

Par son action, le Demandeur, Henri Mignot de Québec, réclamait du Défendeur, James Reed, du même lieu, la somme de $100.00, que le Défendeur avait promis payer à un nommé Bédard, sous certaines conditions, en vertu d'un acte sous seing privé, passé à Québec, le 22 avril 1864, et à lui transportée par Bédard, par acte sous seing-privé, aussi passé à Québec, le 18 Mai, 1864. Le Défendeur répondit par une *Dé-*

(1) Authorities cited on behalf of Opposants : Pardessus, Vol. 4, no 975 and 1087 ; Vincens, *Législ. Comm.*, Vol. 1, *des Sociétés*, cap. 2, § 7 ; Judgment rendered by SMITH, J., in No 28, *Molson* vs. *Burroughs*, et *Burroughs et al.*, Opposants, 31st Dec., 1858. Cited by Plaintiff : 1574, *McLeod* vs. *Caldwell*, and *Guthrie et al.*, Opposants, S. C. judgment rendered 22nd April, 1863.

fense en Droit, dans laquelle il niait le droit d'action du Demandeur, celui-ci ne lui ayant jamais fait signifier son transport. La Cour adoptant les conclusions du Défendeur, maintint la défense en droit, et renvoya l'action du Demandeur avec dépens. Le jugement est comme suit : " La Cour, considérant que le Demandeur n'allègue pas que le transport qu'il a obtenu de la créance sur laquelle son action est basée a été signifié au Défendeur, ou par ce dernier accepté : Considérant qu'en loi, le cessionnaire d'une créance n'en est saisi que par la signification du transport qui en est faite au débiteur, ou par l'acceptation, que ce dernier en ferait, la cour maintient la défense au fond en droit du Défendeur à l'action du Demandeur, et renvoie ladite action, avec dépens. (1) (9 *J.*, p. 27)

HOLT et IRVINE, pour le Demandeur.

TASCHEREAU et BLANCHET, pour le Défendeur.

(1) Le Défendeur cita : Pigeau, *Proc. Civ.*, 1 vol., p. 33 et 41 ; art. 108 de la *Cout. de Paris* ; Pothier, *vente*, nos 316, 554 ; Bourjon, *Droit Commun*, 1er vol., p. 465 ; Coquille, *Cout. de Nivernois*, art. 1er, *des Exécutions* ; Bacquet, *Droits de Justice*, ch. 21, no 288 ; *Journal des Audiences*, vo Transport ; Brodeau, Commentaires sur l'art. 108 de C. de P. ; Troplong, *Vente*, ch. VIII, art. 1691, etc., tome II, nos 882, etc. ; Marcadé, tome VI, p. 325 ; Troplong, *Privilèges et Hyp.*, 1 vol., no 340, art. 2 ; Projet de Code Civil du Bas-Can., *Traité de la vente*, p. 66. Voir le 4e considérant de ce jugement. Art. 1571 C.C.

Un transport de créance, accepté par le notaire au nom du cessionnaire, est suffisamment ratifié et parfait par la signification qui en est faite au nom du cessionnaire, et prend effet du jour de cette signification. (*Perrault et vir* et *La Banque d'Ontario*, C. B. R., Montréal, 19 novembre 1863, LAFONTAINE, Juge-en-Chef, DUVAL, MEREDITH et MONDELET, Juges, infirmant le jugement de C. S., Montréal, 26 décembre 1860, SMITH, J., 12 *R. J. R. Q.*, p. 199.)

Le défaut de signification du transport ne peut rendre le cessionnaire non recevable à produire une opposition à fin de conserver pour recouvrer le montant transporté. (*Lamothe et al.* et *Fontaine dite Bienvenu*, et *P. A. Talon dit Lespérance*, C. B. R., Montréal, 10 mars 1857, LAFONTAINE, dissident, juge en chef, DUVAL, CARON et BADGLEY, juges, infirmant le jugement de C. S., Montréal, 30 mai 1856, 5 *R. J. R. Q.*, p. 168.)

Le 1er mars 1842, Pierre Ste-Marie et Apolline Daigneau, son épouse, par acte de vente passé devant notaires et dûment enregistré, vendirent avec promesse solidaire de garantie à Joseph Brosseau et moyennant la somme de deux cents livres, une terre qui était conquêt de leur communauté. Le prix de la vente fut payé en entier aux vendeurs. Quelque temps après, Brosseau fut évincé de la terre pour une dette de ses vendeurs. La terre, mise en vente par le shérif, fut adjugée à Brosseau pour la somme de £234 qui fut payée au shérif. Apolline Daigneau qui, le 18 février 1843, avait obtenu un jugement en séparation de biens, fit une opposition sur le prix de la terre resté entre les mains du Shérif et demanda à y être colloquée pour le paiement de ses réprises et droits matrimoniaux, auquel son mari avait été condamné par le jugement prononçant la séparation et pour lequel elle avait une hypothèque légale sur tous les biens de son mari depuis le jour de son contrat de mariage, 13 novembre 1811. Brosseau, de son côté, fit opposition, demandant à être colloqué sur ce prix pour le remboursement des répétitions qu'il avait à exercer contre Ste. Marie et son épouse, pour n'avoir pas rempli envers lui leurs obligations résultant de la vente du 1er mars 1842, et contesta l'opposition d'Apolline Daigneau, soutenant qu'il devait lui être colloqué de préférence parce qu'elle était garante du paiement des répétitions et que la terre étant un conquêt de la communauté et la vente lui en ayant été faite par Ste. Marie conjointement avec son épouse, cette dernière était tenue de remplir les obliga-

SAISIE-GAGERIE.—SIGNIFICATION DE DECLARATION.

CIRCUIT COURT, Montreal, 30th June, 1864.

Coram MONK, J.

WARD *vs.* COUSINE.

Held: That, in an action commenced by *saisie-gagerie*, the declaration must be served either by depositing a copy with the clerk of the court within the eight days after service of writ (Cons. Stat. of L. C. ch. 83, sec. 57) or if served in ordinary course must be served on Defendant giving the usual delay before return. (1)

tions portées à cette vente et, notamment, celle de la garantie. Apolline Daigneau répliqua qu'ayant renoncé à la communauté de biens, elle n'était pas, en vertu de l'ordonnance de 1841, tenue à la garantie stipulée par cette vente. La Cour d'Appel a jugé que l'obligation de garantie de la part d'Apolline Daigneau, stipulée par l'acte de vente en question, était nulle et prohibée par la loi, et que l'Opposante, étant créancière antérieure en hypothèque à Brosseau, avait le droit d'être colloquée de préférence à ce dernier dans la distribution des deniers provenant de la vente de l'immeuble. (*Pinsonneault* vs. *Brosseau*, et *Ste. Marie*, Opposante, Cour d'Appel, Montréal, 11 janvier 1847, ROLLAND, J., [illegible] J., 3 Rev. de Leg., p. 134.)

La femme commune en biens peut, avec l'autorisation de son mari, ratifier, pendant la communauté, la vente d'un immeuble conquêt de la communauté faite par le mari, et cette ratification constitue une renonciation à l'hypothèque qu'elle a sur cet immeuble pour ses reprises et, en agissant ainsi, elle ne se porte pas caution et n'encourt pas de responsabilité pour dettes, engagements ou obligations contractés par son mari, et cette renonciation n'enfreint pas la sec. 36 de l'Ord. 4 Vict., ch. 30, qui décrète que "nulle femme mariée ne pourra se porter caution, ni encourir de responsabilité en aucune autre qualité que commune en biens avec son mari, pour les dettes, obligations ou engagements contractés par le mari avant leur mariage, ou pendant la durée du mariage, et tous engagements et obligations contractés par une femme mariée, en violation de cette disposition, seront absolument nuls et de nul effet." Si la femme, en ratifiant la vente, s'est aussi obligée à la garantie de la vente conjointement et solidairement avec son mari, la ratification est valide comme renonciation à ses reprises, mais l'obligation de garantie est nulle comme violant ladite ordonnance. (*Boudria et vir* et *McLean*, C. B. R., Montréal, 4 mars 1862, LAFONTAINE, J. en C., AYLWIN (dissident), DUVAL, MEREDITH et MONDELET (dissident), juges, confirmant le jugement de C. S. District de Beauharnois, 7 février 1861, POLETTE, J., 10 *R. J. R. Q.*, p. 24.)

Le 15 août 1844, Larivée consent une obligation à Jodoin pour la somme de 6000 fr., Dufresne et Julie Gazaille, son épouse, se portant cautions solidaires avec hypothèque spéciale sur une terre désignée dans l'acte d'obligation et qui était un propre de Julie Gazaille. Le 12 Août 1848, Jodoin obtient jugement pour ce montant contre Larivée, Dufresne et sa femme, et, le 10 avril 1851, intente une action hypothécaire contre Laflamme et sa femme, donataire de l'immeuble hypothéqué par Dufresne et sa femme. Julie Gazaille, assistée de son mari et prenant le fait et cause des Défendeurs, conteste la demande de Jodoin, alléguant que cet immeuble lui est propre et que, sur jugement en séparation de biens par elle obtenu le 2 avril 1850, elle a renoncé à la communauté ; qu'en conséquence le cautionnement et le jugement étaient nuls quant à elle. La Cour Supérieure rendit jugement en faveur des Défendeurs, jugeant qu'une femme ne peut s'obliger avec son mari que comme commune et que le cautionnement donné par Julie Gazaille, conjointement avec son mari, par l'acte du 15 août 1844, en faveur de Larivée, etait nul d'après les dispositions de l'Ord. 4 Vict., ch. 30, sec. 36. Sur appel, la Cour du Banc de la Reine à Montréal, le 12 mars 1853, à confirmé le jugement de C. S. (*Jodoin* et *Dufresne et ux*, 3 *R. J. R. Q.*, p. 480.)

(1) V. art. 804, 874 et 891, C. P. C.

A *saisie-gagerie* for $72 issued on the 5th January, 1864, the writ being made returnable the 20th January. The seizure was made on the 15th January, and the declaration was served on Defendant personally, the 19th of January 1864. The Defendant, by *exception à la forme*, pleaded as follows: " Because " no declaration of Plaintiff's action and demand was served " upon Defendant, according to law, by being left at the office " of the clerk of the court, within the delays allowed by law " and the statute, or by a true copy thereof being delivered to " or legally served upon him within like delays, but, on the " contrary, Defendant says that a copy thereof was only deli- " vered to him at the office of his attorneys, on the 19th day of " January, instant, between three and four of the clock in the " afternoon, the day before the return of this action." The court, considering that the declaration had not been served, as required by the Statutes of Lower Canada, ch. 83, sec. 57, or ch. 83, sec. 170, ss. 2, maintained the *Exception à la forme*. (9 *J*., p. 28.)

DEVLIN & KERR for Plaintiff.

PERKINS & STEPHENS, for Defendant.

PROCEDURE.—ACQUIESCEMENT.

QUEEN'S BENCH, APPEAL SIDE, Québec, 17 décembre 1864.

Before DUVAL, Chief-Justice, AYLWIN, MEREDITH, MONDELET and DRUMMOND, Justices.

DAIGLE, Appelant, *and* KIMBALL, Respondent.

Jugé: 1o. Que, lorsque des irrégularités ont eu lieu dans la procédure devant le tribunal de première instance, la partie est tenue de s'en prévaloir lors de l'audition finale de la cause devant ce tribunal.

2o. Qu'une partie négligeant de se prévaloir de telles objections, qui lui étaient connues, devant le tribunal inférieur, les soumettant directement à la considération de la Cour d'Appel, ne recouvrera pas ses frais d'Appel, même si elle réussit. (1)

The action in which the present appeal was instituted was commenced in the Circuit Court for the district of Arthabaska, founded on Appellant's promissory note for $133.41, in favor of Respondent. The Appellant complained that, by the judgment rendered in the Circuit Court, on the 12th March, 1864, he had been condemned to pay the above amount, without having been foreclosed from his right to defend the action, and that the cause had never been regularly inscribed for

(1) V. art. 119 C. P. C.

enquête and hearing. It appeared that, after the return of the writ, Defendant had appeared and moved for security for costs, and that, on the 19th of November, 1863, Plaintiff had put in security; on the same day, Defendant moved, *nisi causa*, on the 7th January then next, to reject the security put in; on the 12th December, Plaintiff had demanded Defendant's pleas, and, on the 22d, had himself irregularly foreclosed Defendant, on the 7th January, Defendant's motion to reject the security was made absolute: on the 9th, Plaintiff moved to put in, and did put in, other security, and, on the 11th, served a demand of pleas upon Defendant without having previously notified him that security had been put in. Thus Plaintiff had irregularly obtained the judgment complained of, without having taken out an *acte* of foreclosure, without permission to proceed *exparte*, and without any inscription of the cause. The Respondent answered that all the proceedings were regular, and that, when the case had been called from the *Rôle de Droit*, Respondent had declared his *enquête* closed, and the attorney for Defendant, who was then present in court, being called upon to argue the case for his client, had then declared that he had nothing to say.

Duval, Chief-Justice: The principal question at issue is one of costs, for the grounds upon which the appeal is instituted are good, but to entitle Appellant to his costs in this court, he should have urged these objections at the final hearing of the cause in the Lower Court, all objections of this nature must be made immediately after the informalities which give rise to them have taken place, this is and always has been the rule both in England and in France. If a party is aware of an error or informality that must be fatal to the cause when the case is before the Lower Court, and does not mention it to the court, but brings the case before this court and here, for the first time, raises the objection, we will give him a judgment, if his objection is good, but he will pay his own costs.

Judgment: "The Court considering that the proceedings taken by Plaintiff were irregular and contrary to the course and practice of the court, and that the act of foreclosure of Defendant was made before Defendant was bound to plead to the demand of Plaintiff, and that no final judgment on the merits of Plaintiff's demand could be pronounced,by the Circuit Court; and seeing that, in the judgement pronounced, there is error, doth set aside the act of foreclosure of Defendant, and doth order that the record be remitted to the Circuit Court, &c. On the question of costs, seeing that Defendant did not, in the Circuit Court, object to the irregularities above mentioned, and bring the same under the consideration of the

said court, that the said irregularities were first complained of in this court, thus exposing the parties to unnecessary delay and expense, which would have been avoided, had Defendant made his objection to the irregularities in the Court below, this court doth order that no costs be allowed to Appellant, either on the proceedings in the Circuit Court, or on this appeal. MONDELET and DRUMMOND, Justices, dissenting as to costs. (15 *D. T. B. C.*, p. 138.)

PACAUD, for Appellant.

CARTER, for Respondent.

POURSUITE BASEE SUR ECRIT SOUS SEING PRIVE.

SUPERIOR COURT, Montréal, 31 octobre 1864.

Before MONK, Justice.

ROGERS *et al.*, Plaintiffs, *vs.* HERSEY, Defendant.

Dans une action par un créancier d'une compagnie de chemin de fer contre le Défendeur, pour recouvrer le montant des actions qu'il avait, ainsi qu'allégué dans la déclaration, "dûment prises et était devenu "membre de la compagnie jusqu'à concurrence desdites actions;" le Demandeur produisit à l'enquête le livre de la compagnie, dans lequel le nom du Défendeur apparaissait comme actionnaire, mais il fit défaut de prouver la signature ; le Défendeur prouva que la signature n'était pas la sienne, ni autorisée par lui ; une objection ayant éte faite à l'audition, que le Défendeur était tenu, en vertu du Stat. Ref. du B. C., chap. 83, sec. 86, de produire avec son plaidoyer un affidavit que la signature était fausse.

Jugé: 1° Que telle objection ne sera pas maintenue, et la cause ne sera pas regardée comme tombant sous la section citée. (1)

2° Que le fait que le nom du Défendeur apparaissait dans l'acte d'incorporation de la compagnie, comme l'un des directeurs provisoires, ne sera pas considéré comme autorisant la cour à présumer qu'il était devenu actionnaire, plus particulièrement s'il n'y a aucune preuve qu'il eût agi comme directeur provisoire, ou qu'il se fût rendu à aucune des assemblées de la compagnie.

The Plaintiffs' declaration set up a judgment rendered in the Superior Court, at Montreal, on the 28th June, 1858, at the suit of Plaintiffs, against the Montreal and Bytown Railway Company, for £22,265, on certain bonds and debentures of the company ; the insolvency of the company, and the return into court of an execution unsatisfied, then followed an allegation : "that, on or about the 8th October, 1853, Defendant "duly subscribed for, and became a share-holder to the extent "of twelve shares of £25 each of the capital stock of the said

(1) V. art. 145 C. P. C. et 1223 C. C.

" Railway Company, and, ever since, continued to be a share-" holder, to the extent of twelve shares, or sum of £300; and " that, by reason of the premises, Defendant became liable to " Plaintiff, as creditor of the company, for the said sum;" for which a condemnation was prayed. The Defendant, by his first plea, denied that he had subscribed for any stock, and that Plaintiffs were now creditors of the company. Other pleas were filed alleging the illegal organisation of the company before the required amount of stock, £120,000, had been subscribed; that no calls for payment of shares had been made, that a pretended and illegal subscription for stock, to the extent of £100,000, made by Charles Wilson, pretending to act as Mayor of the City of Montreal, had been made, contrary to the express terms of a resolution of the Corporation of Montreal, which had been counted as part of the stock *bonâ fide* subscribed for, as also a pretended subscription by the county of the Lake of Two Mountains for £50,000, which had been set aside and declared illegal by a judgment of the Superior Court, at Montreal, of the 15th August, 1863. The Plaintiffs proceeded first to *enquête*, and produced a copy of the stock book, the original being filed in a cause pending in appeal, in which book appeared the following entry: " 1853, October 8th, Chas. Hersey, West Hawkesbury, twelve shares, countersigned, Sidney Bellingham." The Defendant, examined as a witness, positively denied the entry, or that he had ever subscribed for stock, or authorized any subscription on his behalf. Bellingham and other witnesses were examined to prove the signature in the stock book produced at *enquête*, but none of the witnesses stated the signature to be that of Defendant. Six witnesses examined for Defendant stated the signature was not his, nor did it in any way resemble his hand writing, Defendant constantly signing "Chs." not "Chas. Hersey." At the argument, DORION (Wilfred) for Plaintiff, admitted that Defendant's signature was not made out in proof, and that the evidence seemed to establish that the signature was not his, but contended that, under the Con. Stat. of L. C., chap. 83, sect. 86, (1) Defendant was bound to have made an affidavit that his signature was forged, and to have filed it with his plea. That a strong presumption against Defendant was to be drawn

(1) Section 86: If any action on a bill of exchange or promissory note, *cédule*, check, note or promise, or other act or private agreement in writing the Defendant makes default, &c. 2. If in any such action, any Defendant denies his signature, or any other signature or writing to or upon such bill, note, *cédule*, check, promise, act or agreement, or the genuineness of such instrument or of any part thereof, &c., such instrument and signature shall nevertheless be *presumed to be genuine* &c., unless with such plea there be filed an affidavit, &c.

from the fact that his name appeared in the act of incorporation as one of the provisional directors of the company.

Robertson, Q. C., for Defendant, contended that the section of the law referred to did not apply to the case before the Court; that Defendant was not shewn to have been aware of the existence of the stock-book, which had not been produced when the plea was filed, and that, moreover, under the ruling of Chief-Justice Lafontaine, in *Brown* and *Dow*, (1) a signature such as contemplated by the act could only, according to its terms, be *presumed true*. That Defendant could destroy this presumption, which was merely a *presumptio juris*, by proof, as had been done in this case.

Monk, Justice, said that the signature had been clearly proved not to be that of Defendant; that Plaintiffs had, by their conduct of the case, admitted they were bound to prove the signature, and had attempted to prove it, but had failed to do so; and that the allegations of the declaration as made, and the fact of the production at *enquête* of the stock book, which Defendant could not be held to be aware of, or to make affidavit as to his alleged signature being a forgery, as well as the terms made use of in the section referred to, led him to hold that the case did not fall within the provision of the section. As to Defendant's being a provisional director, whatever presumption might be drawn from that, it had not been shewn that Defendant had attended any meeting of the provisional directors, or of the company, and the Court could not presume from the sole fact of his name being inserted in the statute as a provisional director, that he had become a

(1) Dans une action contre un endosseur, le Défendeur plaida par exception que les signatures endossées sur les billets n'étaient pas sa signature, et n'y avaient pas été apposées à sa connaissance, de son consentement ou avec son autorité, et qu'il ne connaissait pas l'existence desdits billets avant la signification du protêt: il plaida aussi une défense au fond en fait, et au bas de ces plaidoyers était un affidavit du Défendeur, que tous les faits articulés en iceux étaient bien fondés. La preuve faite, il fut prétendu, lors de l'audition de la cause, que le Demandeur devait obtenir jugement en vertu des dispositions de la 87e section de la 20e Vic., cap. 44, l'affidavit n'étant pas dans la forme voulue. Sur ce, motion fut faite par le Défendeur pour rayer la cause du rôle et la retirer du délibéré, et pour qu'il lui fût permis d'enfiler l'affidavit produit avec la motion au soutien de ses plaidoyers. Le 31 mars 1860, la Cour Supérieure (Smith, J.) rendit jugement en faveur du Demandeur, jugeant que la motion était inadmissible, et que le droit du Demandeur de prendre les signatures comme vraies et d'obtenir jugement était un droit acquis à l'égard duquel la cour ne devait pas intervenir, la vérité des signatures n'ayant pas été légalement révoquée en doute. Sur appel, la Cour du Banc de la Reine (Lafontaine, J. en C., Aylwin, J., Duval, J., Meredith, J., et Mondelet, J.) a, le 1er juin 1861, infirmé le jugement de C. S., jugeant que l'affidavit était suffisant et que la signature endossée sur les billets n'était pas la signature de l'Appelant, mais était contrefaite. (*Brown* et *Dow* 8 R. J. R. Q., p. 451 et 453.)

subscriber for any shares, or for twelve rather than any specified number of shares, more or less than twelve. The action must therefore be dismissed. JUDGMENT: "The Court, considering that Plaintiffs have failed to prove the material allegations of their declaration, and, particularly, that they have failed to prove that Defendant was a shareholder in the Montreal and Bytown Railway Company, doth dismiss Plaintiffs' action, with costs. (15 *D. T. B. C.*, p. 141.)

DORION, DORION and SÉNÉCAL, for Plaintiffs.

ROBERTSON, A. and W., for Defendant.

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